This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY

# CIVIL

# PROCEDURE REPORTS

CONTAINING CASES UNDER THE

## CODE OF CIVIL PROCEDURE

AND

## THE GENERAL CIVIL PRACTICE

OF THE

## STATE OF NEW YORK

REPORTED WITH NOTES

BY

RUFUS L. SCOTT, JR.

OF THE NEW YORK BAR

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CONSTRUED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: NEW YORK REPORTS, VOLS. 145 TO 148 INC.; HUN'S REPORTS, VOLS. 88 TO 92 INC.; APPELLATE DIVISION, VOLS. 1, 2, 3; NEW YORK LAW RECORD, VOL. 1, PAGES 1 TO 120 INC.; DELEHANTY'S MISC. REPORTS, VOLS. 11 TO 15 INC.; AND NEW YORK CIVIL PROCEDURE REPORTS, VOL. 25

VOLUME XXV.

NEW YORK

S. S. PELOUBET

LAW BOOKSELLER AND PUBLISHER

1896

COPYRIGHT, 1896,
BY S. S. PELOUBET.

Rec. Oct. 2, 1896.

# CONTENTS.


| Sections of the Code of Civil Procedure. | | Page |
|---|---|---|
| 14 | FROMME *v.* GREY | 116, 273 |
| | Interposition of false answer not a contempt of court. | |
| 14 | PEOPLE *ex rel.* POND *v.* TAMSEN, sheriff | 141 |
| | Contempt; warrant need not recite the proceedings upon which it rests. | |
| 66 | PUBLISHER'S PRINTING CO. *v.* GILLIN PRINTING CO. | 327 |
| | Attorney's lien; after settlement. | |
| 383 | BLAKE *v.* CLAUSEN | 310 |
| | Statute of limitations; trustee of corporation; failure to file annual report. | |
| 384, 401 | SALISBURY *v.* BENNETT | 306 |
| | Motion to amend answer by setting up statute of limitations. | |
| 401 | Hart *v.* KIP | 205 |
| | Statute of limitations; interpretation of section 401 of the code. | |
| 410 | DOLAN *v.* DAVIDSON | 408 |
| | Action on check; when statute begins to run. | |
| 415 | BLAKE *v.* CLAUSEN | 310 |
| | Statute of limitations. | |
| 417, 418 | GEORGE *v.* FITZPATRICK | 383 |
| | Service of summons by publication. | |
| 432 | KEILEY *v.* CENTRAL COMPLETE COMBUSTION CO. | 48 |
| | Attachment against foreign corporation; sufficient service of summons. | |
| 432 | STANTON *v.* U. S. PIPE LINE CO | 180 |
| | Affidavit taken without the state; service of summons on director of foreign corporation within the state. | |
| 435, 445 | SABIN *v.* KENDRICK | 280 |
| | Order for publication of summons; service without the state; attachment; time within which summons must be served. | |
| 438, 439 | FOSTER *v.* ELECTRIC HEAT REGULATOR CO | 223 |
| | Service of summons by publication; order set aside for want of jurisdiction. | |
| 439 | ORR *v.* CURRIE | 16 |

| Sections of the Code of Civil Procedure. | | Page |
|---|---|---|
| | Order of publication of summons; affidavit insufficient to support. | |
| | *Note on sufficiency of affidavit to support order of publication of summons* | 16 |
| 446, 488 | TRUEB *v.* N. Y. ASBESTOS CO. | 347 |
| 546 | Demurrer; cause of action obviously joint, though not so stated. | |
| 451 | VAN HATTEN *v.* SCHOLL | 247 |
| | Designation of defendant whose Christian name is unknown; validity of judgment. | |
| 452 | DUBOIS *v.* THE UNION DIME SAVINGS INSTITUTION | 288 |
| | Application to substitute defendant under section 820 of the code; rival claimants disagree as to amount due. | |
| 452 | MERCHANTS' NATIONAL BANK *v.* HEGEMEYER | 332 |
| | Action on promissory note; general assignee of makers allowed to intervene. | |
| 452, 453 | GRISWOLD *v.* CALDWELL, BIEN *et al* | 122 |
| | Bringing in additional parties or substituting parties. | |
| 454, 490 | ISEAR *v.* MCMAHON | 217 |
| | Uniting of actions against two or more persons severally liable upon the same written instrument. | |
| 458, 467 | MCNAMARA *v.* NOLAN | 35 |
| | Order permitting prosecution as "poor person" appealable because affecting a substantial right; what is necessary to the validity of the order. | |
| 478, 546 | DEEVES *v.* THE MET. REALTY CO | 276 |
| | Pleadings; to be considered together. | |
| 502 | GALLAGHER *v.* THE STEVENSON BREWING CO | 106 |
| | Counterclaim against guardian personally not available in summary proceedings. | |
| 522 | GILBERT *v.* MCKENNA | 143 |
| | Foreclosure; motion to strike off cause for want of reply to counterclaim. | |
| 522 | COCHRAN *v.* REICH | 147 |
| | Pleading and proof; non-payment as a necessary element of plaintiff's cause of action and payment as an affirmative defense. | |
| 531 | SPIES *v.* MICHELSEN | 188 |
| | Bill of particulars; forms no part of the pleadings. | |
| 532 | RINGLE *v.* THE WALLIS IRON WORKS | 261 |
| | Action on bond to discharge mechanic's lien; assignment of bond to plaintiffs unnecessary. | |
| 544 | O'SULLIVAN *v.* N. Y. EL. R. R. CO | 163 |
| | Survival of cause of action; substitution of representatives of deceased plaintiff; supplemental bill. | |
| 578, 587 | HAMILTON *v.* GORMAN | 70 |

| Sections of the Code of Civil Procedure. | | Page |
|---|---|---|
| 595, 596 | When sheriff liable as bail; action therefore does not abate on death of sheriff. | |
| 635 | ROUGE v. ROUGE | 102 |
| | Attachment against property in action for personal injuries. | |
| 635 | SALISBURY v. BENNETT | 306 |
| | Motion to amend answer by setting up statute of limitations. | |
| 636, 638 | KIELEY v. CENTRAL COMPLETE COMBUSTION CO. | 48 |
| | Attachment against foreign corporation; sufficient service of summons. | |
| 638 | SABIN v. KENDRICK | 280 |
| | Order for publication of summons; attachment. | |
| 636, 641 | STURZ v. FISCHER | 202 |
| 663 | Attachment; alternative grounds; motion to vacate warrant. | |
| 641 | STONE v. PRATT | 176 |
| | Attachment; not an original process; power of the court to amend the warrant; the word "must" not mandatory in statute. | |
| 644, 697 | GILLIG v. TREADWELL CO., defendant; GRANT, as temporary receiver, respondent | 197 |
| | Successive attachments; priority; levies upon different pieces of property | |
| 649, 650 | COURTNEY v. EIGHTH WARD BANK OF BROOKLYN | 156 |
| | Warrant of attachment; what is a certified copy. | |
| 649, 655 | HARDING v. ELLIOTT | 294 |
| | Action to set aside assignment in aid of attachment. | |
| 709 | LAWLOR v. MAGNOLIA METAL CO | 235 |
| | Attachment; sheriff's fees; by whom paid. | |
| 713 | JOHNSON v. COCHRAN | 215 |
| | Action to determine the validity of probate of a will; appointment of receiver *pendente lite*. | |
| 723 | STONE v. PRATT | 176 |
| | Attachment; not an original process; power of the court to amend the warrant. | |
| 724 | FEIST v. THIRD AVE. R. R. CO | 257 |
| | District courts; origin and extent of power to open defaults. | |
| 755, 760 | GRISWOLD v. CALDWELL *et al* | 122 |
| | Bringing in additional parties or substituting parties; substituted trustee where trust interest has devolved. | |
| 757 | O'SULLIVAN v. N. Y. EL. R. R. CO | 163 |
| | Survival of cause of action; substitution of representatives of deceased plaintiff. | |
| 757 | HAMILTON v. GORMAN | 70 |
| | When sheriff liable as bail. | |

| Sections of the Code of Civil Procedure. | | Page |
|---|---|---|
| 772, 873 | BYRNES *v.* LADEW | 194 |
| | Examination of party before trial; motion to vacate order for examination; where properly heard. | |
| 811 | ELLENSOHN *v.* HAZELBACK | 345 |
| | Security for costs. | |
| 814 | RINGLE *v.* THE WALLIS IRON WORKS | 261 |
| | Action on bond to discharge mechanic's lien. | |
| 820 | DUBOIS *v.* THE UNION DIME SAVINGS INSTITUTION | 288 |
| | Application to substitute defendant. | |
| 834 | BARKER *v.* THE CUNARD S. S. CO. | 108 |
| | Action by resident of the state against a foreign corporation; resident of plaintiff; jurisdiction; knowledge obtained by physician; privileged. | |
| 834 | MORRIS *v.* N. Y., O. & W. R'Y. CO. | 168 |
| | Physician and patient; waiver of right of secrecy as to information gained in professional capacity. | |
| 844 | STANTON *v.* U. S. PIPE LINE CO | 180 |
| | Affidavit taken without the state. | |
| 870, 872 | *In re* GAINS | 243 |
| | Examination of adversary before trial; what the affidavit must contain. | |
| 873 | FARMERS' NATIONAL BANK OF ANNAPOLIS *v.* UNDERWOOD | 94 |
| | Power of court to extend time to answer until non-resident plaintiff complies with order for his examination; order binding while in force, though not properly granted. | |
| 873 | BOWE *v.* BRUNNBAUER | 56 |
| | Physical examination of party before trial; order requiring plaintiff's attorney to produce plaintiff, of no effect. | |
| 970 | BOWEN *v.* SWEENEY | 128 |
| | Decree of surrogate's court, admitting will to probate binding only as to personalty. | |
| 17, 971 | ELLENSOHN *v.* KEYES | 353 |
| | Jury trial in equity suit; limit of time. | |
| 974 | N. Y. LIFE INSURANCE & TRUST CO. *v.* CUTHBERT, IVES *et al.* | 377 |
| | Accounting; counterclaim interposed. | |
| 982–984 | SPAULDING *v.* AMERICAN WOOD-BOARD CO | 376 |
| 986 | Right to change of venue; when lost. | |
| 1022 | HARDING *v.* ELLIOTT | 294 |
| | Action to set aside assignment. | |
| 1022 | MATTER OF BALDWIN | 6 |
| | Judgment entered by clerk upon referee's report held void. | |
| | *Note on entry of judgment on referee's report.* | 12 |

Sections of the Code of Civil Procedure. Page.

1022 ESTATE OF HAVEMEYER..... 59
Findings; must be passed upon by referee appointed by surrogate's court.

1200 PRENTISS v. BOWDEN..... 144
Entry of judgment waives right to appeal from judgment.

1205 HAND v. ROGERS..... 254
Suit against co-partners; co-partnership must be proved as alleged.

1207, 1279 BRENEN v. NORTH..... 398
Premature filing of *lis pendens*, relief granted by judgment broader than the prayer of the complaint.

1215, 1223 WINTERSON v. HITCHINGS..... 1
Default; what is admitted thereby.

1228 MATTER OF BALDWIN..... 6
Judgment entered by clerk upon referee's report held void.

1241 PEOPLE *ex rel.* POND v. TAMSEN, sheriff..... 141
Contempt; warrant of attachment need not recite proceedings.

1260 MITCHELL v. PIQUA CLUB ASS'N..... 139
Satisfaction of judgment by attorney whose authority has been revoked.

1331 N. Y. SECURITY & TRUST CO. v. SARATOGA GAS AND ELECTRIC LIGHT CO..... 385
Undertaking on appeal from judgment of sale of real property.

1344 LYNCH v. SAUER..... 286
Practice on allowing appeals from Appellate Term to appellate division.

1347 MANHATTAN R'Y CO. v. O'SULLIVAN..... 233
Stay on appeal from order setting aside the award of commissioners.

1356 *In re* DE LONG..... 363
1377 Stay granted pending appeal.

1398 TOOLE v. BOARD OF SUPERVISORS..... 267
Property purchased with pension moneys; exempt from seizure for non-payment of taxes.

1406, 1407 GILLIG v. TREADWELL CO..... 197
Successive attachments; priority.

1421, 1424 CORN v. TAMSEN..... 268
Substitution of indemnitors on bond as defendants in place of sheriff.

1537, 1544 BOWEN v. SWEENEY..... 126
Decree of surrogate's court admitting will to probate binding only as to personalty.

1538 UNDERHILL v. UNDERHILL..... 374

Sections of the Code of Civil Procedure. Pages.

Partition; representatives of deceased ancestors need not be made parties.

1540 JACKSON v. BRADHURST ..... 228
Action for partition; creditor's lien attaches only to debtor's share where partition is made, but to the whole premises, where a sale is made.

1639, 1639 BARRIG v. KICK ..... 237
Foreclosure of mechanic's lien; action on debt secured thereby; remedies not cumulative and concurrent.

1639 BARRIG v. KICK ..... 62
Mechanic's lien; foreclosure; remedy at law, once begun, must be exhausted first.

1670 BRENEN v. NORTH ..... 398
Premature filing of *lis pendens*; service of summons by publication.

1695, 1722 MORTON v. CHESLEY ..... 230

1726, 1760 Order of arrest in action of replevin; complaint must state specifically the value of the goods.

1743 FISK v. FISK ..... 88
Misrepresentation as ground for annulling marriage.

1776 KINGSTON CARRIAGE CO. v. HUTTON ..... 68
Action by or against a corporation; when its existence need not be proved on the trial.

1780 CREMINS v. EAST LAKE WOOLEN CO. ..... 365
Attachment; affidavit setting up jurisdictional facts cannot be filed *nunc pro tunc*.

1780 BARKER v. THE CUNARD S. S. CO. ..... 108
Action by resident of the state against a foreign corporation; resident of plaintiff; jurisdiction.

1780 FOSTER v. ELECTRIC HEAT REGULATOR CO. ..... 223
Service of summons by publication; order set aside for want of jurisdiction.

1785, 1786 PEOPLE v. EQUIT. MUT. FIRE INS. CORP. OF N. Y. .... 210
1788, 1810 Application for appointment of temporary receiver of mutual fire insurance corporation; what facts must be presented.

1902, 1904 COGHLAN v. THIRD AVENUE R. R. ..... 249
Action to recover damages for death of infant; loss of service.

2059 *In re* JOHN QUINN ..... [illegible]
*Habeas corpus*; appeal by city marshal from order discharging prisoner from custody.

2125, 2140 JORDAN v. THE BOARD OF EDUCATION ..... 89
*Certiorari*; will not issue to compel a rehearing; mandamus; not the proper remedy to review erroneous decision.

Sections of the Code of Civil Procedure. Page

2136 PEOPLE *ex rel.* PHILIP E. MILLER *v.* WURSTER, COM'R, etc. ..... 367
*Certiorari*; cause must be heard upon the writ and return.

2233 GOELET *v.* ROE ..... 86
Summary proceedings; landlord may remove sub-lessee after expiration of lease to lessee.

2244 GALLAGHER *v.* THE STEVENSON BREWING CO. ..... 106
Counterclaim against guardian personally not available in summary proceedings.

2232, 2235 HARRIS *v.* TREU ..... 92
Summary proceedings; in action to stay warrant and open judgment denied.

2280 PEOPLE *ex rel.* POND *v.* TAMSEN, sheriff ..... 141
Contempt; warrant of attachment.

2325 *In re* JOHN PARKE ..... 196
Lunatic; appointment of committee of person and property.

2442 PEOPLE *v.* LEVY ..... 390
Supplementary Proceedings.

2446, 2447 KNIGHTS OF PYTHIAS *v.* MANHATTAN SAVINGS INST. .. 44
Effect of direction to third person to pay over made in supplementary proceedings.

2447 KRONE *v.* KLOTZ, *et al* ..... 320
Supplementary proceedings; order requiring third person to pay over money the ownership of which is in dispute.

2458 MONOLITHIC DRAIN AND CONDUIT CO. *v.* DEWSNAP ... 380
Trust fund interest of beneficiary cannot be reached in supplementary proceedings.

2472 subd. 2. *In re* HUNTLEY ..... 78
On executor's accounting; expenses incurred in unwise litigation will not be allowed.

2481 subd. 2, ESTATE OF ABBEY E. LAYTIN ..... 186
2449 ..... Proceeding for revocation of probate; when citations must issue.

2517, 2528 *In re* GREGORY'S ESTATE ..... 71
2532 Probate of will; waiver of citation does not confer jurisdiction.

2549 ESTATE OF HAVEMEYER ..... 59
Findings; must be passed upon by referee appointed by the surrogate's court.

*Note on findings passed upon by referee appointed by surrogate* ..... 61

2600, 2601 *In re* HORN ..... 357
2743, 2822 Surrogate's power to detain share of beneficiaries; liability of surety sections 2743, 2822 construed.

| Sections of the Code of Civil Procedure. | | Page |
|---|---|---|
| 2620 | *In re* OLIVER'S WILL | 25 |
| | Probate of will upon proof of handwriting of testator and subscribing witnesses. | |
| 2647, 2648 | MATTER OF ANTOINE RUPPANER | 158 |
| 2649, 2653*a* 2694 | Proceedings for revocation of probate; when barred by judgment previously rendered; necessary parties; personal property governed by law of the domicile. | |
| 2653*a* | BOWEN *v.* SWEENEY | 128 |
| | Probate of will; decree binding only as to personalty. | |
| 2653A | LEWIS *v.* COOK | 65 |
| | Action to determine the validity of the probate of a will; when it may be commenced. | |
| 2653*a* | JOHNSON *v.* COCHRAN | 215 |
| | Action to determine validity of probate. | |
| 2718 | MULLIGAN *v.* CANNON | 348 |
| | Claim against decedent's estate. | |
| 2730 | *In re* HUNTLEY | 78 |
| | On executor's accounting; expenses incurred in unwise litigation will not be allowed. | |
| 2730 | ESTATE OF JOSEPH P. QUINN | 240 |
| | Accounting by testamentary trustee; disbursements for attorney's fees not allowed. | |
| 2752, 2759 | ESTATE OF JOHANNA LICHTENSTEIN | 301 |
| | Payment of debts of decedent; personal estate must be exhausted before recourse can be had to his real estate. | |
| 2756 | *In re* STOWELL'S ESTATE | 316 |
| | Decedent's estate; debts allowable against real estate. | |
| 2827, 2830 2852 | MATTER OF ALEXANDRE | 42 |
| | Mother of infant cannot be appointed testamentary guardian. | |
| 2990 | SHERMAN *v.* GREEN | 191 |
| | Jury trial in justice's court; waived when not demanded on return day. | |
| 3053 | LAZARUS *v.* LUDWIG | 342 |
| | Justices return on appeal; time for filing. | |
| 3160 | PEOPLE *v.* LEVY, | 390 |
| | Supplementary proceedings. | |
| 3169 subd. 3 | NIAGARA FALLS PAPER CO. *v.* STERLING | 251 |
| | Attachment; necessary allegations as to non-residence of defendants. | |
| 3191 | MCNAMARA *v.* NOLAN | 35 |
| | Order permitting prosecution as "poor person" appealable because affecting a substantial right. | |
| 3240 | CITY OF BROOKLYN *v.* LONG ISLAND WATER SUPPLY CO | 14 |
| | Extra allowance in condemnation proceedings. | |

Sections of the Code of Civil Procedure. Page

3253 BARNES v. MEYER ..... 372
Extra allowance in foreclosure cases; leasehold estate not "real property" under § 3253.

3271, 3272 RIDGWAY v. SYMONS ..... 23
Order requiring plaintiff as receiver to file security for costs should be made by the court discretionary.
*Note on order requiring plaintiff as receiver to file security for costs* ..... 24
Will not be granted unless action is brought in bad faith ..... 23

3272 SCHWARTZ v. SCOTT ..... 53
Security for costs; effect of laches in applying for order.
*Note on security for costs* ..... 54

3273 ELLENSOHN v. HAZELBACK ..... 345
Security for costs.

3297 HOSMER v. GANS ..... 100
Compensation of referee on sale in foreclosure.

3347 subd. 6 FEIST v. THIRD AVENUE R. R. Co. ..... 257
District Courts; origin and extent of power to open defaults.

3372 CITY OF BROOKLYN v. LONG ISLAND WATER SUPPLY Co ..... 14
Extra allowance in condemnation proceedings.

3382 MANHATTAN R'Y Co. v. O'SULLIVAN ..... 233
Stay on appeal from order setting aside the award of commissioners.

# TABLE OF CASES REPORTED.


A.

Page

Alexandre, Matter of..... 42
American Wood-Board Co., Spaulding v..... 376

B.

Baldwin, Matter of..... 6
Barbig v. Kick..... 62
Barbig v. Kick..... 237
Barker v. Cunard Steamship Co..... 109
Barnes v. Meyer..... 372
Bennett, Salisbury v..... 306
Bien, Griswold v..... 123
Blake v. Clausen..... 310
Board of Education, Jordon v. 89
Board of Supervisors of Oneida Co., Toole v..... 267
Bowe v. Brunnbrauer..... 57
Bowen v. Sweeney..... 128
Bowden, Prentiss v..... 145
Bradhurst, Jackson v..... 228
Breneh v. North..... 398
Brunnbauer, Bowe v..... 57
Byrnes v. Ladew..... 194

C.

Caldwell, Griswold v..... 123
Cannon, Mulligan v..... 348
Central Combustion Co. Kieley v..... 48
City of Brooklyn v. Long Island Water Supply Co..... 14
Chesley, Morton v..... 230
Clausen, Blake v..... 310
Cochran, Johnson v..... 215
Cochran v. Reich..... 147
Coghlan v. Third Avenue Railroad..... 249
Cook, Lewis v..... 65
Corn v. Tamsen..... 283
Cremins v. East Lake Woolen Co..... 365

Page

Courtney v. Eighth Ward Bank of Brooklyn..... 157
Cunard Steamship Co., Barker v..... 109
Currie, Orr v..... 16
Cuthbert, Ives et al., N. Y. Life Insurance & Trust Co. v. 377

D.

Davidson, Dolan v..... 403
DeLong, In re..... 363
Deeves v. Metropolitan Realty Co..... 276
Dewsnap, Monolithic Drain & Conduit Co. v..... 380
Dolan v. Davidson..... 403
DuBois v. Union Dime Savings Institution..... 298

E.

East Lake Woolen Co., Cremins v..... 365
Eighth Ward Bank of Brooklyn, Courtney v..... 157
Electric Heat Regulator Co. v. Foster..... 223
Ellensohn v. Haselbach..... 345
Ellensohn v. Keyes..... 353
Elliott, Harding and Tamsen v..... 294
Equitable Mutual Fire Insurance Corp., State of New York v..... 210
Estate of Havemeyer..... 59
Estate of Laytin..... 186
Estate of Lichtenstein..... 301

F.

Farmers National Bank of Annapolis v. Underwood..... 95
Feist v. Third Avenue Railroad Co..... 267

Page
Fischer, Sturz v. ..... 202
Fisk v. Fisk ..... 38
Fisk, Fisk v. ..... 38
FitzPatrick, George v. ..... 383
Foster v. Electric Heat Regulator Co ..... 223
Fromme v. Grey ..... 119
Fromme v. Grey ..... 273

G.

Gains, *In re* ..... 243
Gallagher v. Stevenson Brewing Co ..... 107
Gans, Hosmer v. ..... 101
George v. FitzPatrick ..... 383
Gilbert v. McKenna ..... 143
Gillig Printing Co., Publishers' Printing Co. v. ..... 327
Gillig v. Treadwell Co ..... 197
Goelet v. Roe ..... 87
Gregory's Estate, *In re* ..... 71
Grey, Fromme v. ..... 116
Grey, Fromme v. ..... 273
Green, Sherman v. ..... 190
Griswold v. Caldwell and Bien. 123

H.

Hagemeyer, Merchants' National Bank v. ..... 332
Hand v. Rogers ..... 254
Harding and Tamsen v. Elliott 294
Harris v. Treu ..... 93
Hart v. Kip ..... 205
Haselbach, Ellensohn v. ..... 345
Havemeyer, Estate of ..... 59
Hitchings, Winterson v. ..... 1
Horn, *In re* ..... 357
Hosmer v. Gans ..... 101
Huntley, *In re* ..... 79
Hutton, Kingston Carriage Co. v. ..... 69

I.

Isear v. McMahon ..... 217

J.

Jackson v. Bradhurst ..... 228
Johnson v. Cochran ..... 215
Jordan v. Board of Education. 89

K.

Kendrick, Sabin v. ..... 280
Keyes, Ellensohn v. ..... 358

Page
Kick, Barbig v. ..... 62
Kick, Barbig v. ..... 237
Kieley v. Central Combustion Co ..... 48
Kingston Carriage Co. v. Hutton ..... 69
Kip, Hart v. ..... 205
Klotz, Krone v. ..... 320
Knights of Pythias v. Manhattan Savings Institution ..... 44
Krone v. Klotz ..... 320

L.

Ladew, Byrnes v. ..... 194
Lawler v. Magnolia Metal Co.. 235
Laytin, Estate of ..... 186
Lazarus v. Ludwig ..... 342
Levy, People v. ..... 390
Lewis v. Cook ..... 65
Lichtenstein, Estate of ..... 301
Long Island Water Supply Co., City of Brooklyn v. ..... 14
Ludwig, Lazarus v. ..... 342
Lynch v. Sauer ..... 287

M.

McKenna, Gilbert v. ..... 143
McMahon, Isear v. ..... 217
McNamara v. Nolan ..... 35
Magnolia Metal Co., Lawler v. 235
Manhattan Railway Co. v. O'Sullivan ..... 233
Manhattan Savings Institution, Knights of Pythias v. ..... 44
Matter of Alexandre ..... 42
Matter of Baldwin ..... 6
Matter of Quinn ..... 227
Matter of Antoine Ruppaner.. 159
Merchants' National Bank v. Hagemeyer ..... 332
Metropolitan Realty Co., Deeves v. ..... 276
Meyer, Barnes v. ..... 372
Michelsen, Spies v. ..... 188
Mitchell v. Piqua Club Association ..... 139
Monolithic Drain & Conduit Co. v. Dewsnap ..... 380
Morris v. N. Y., Ontario & Western Railway Co ..... 169
Morton v. Chesley ..... 230
Mulligan v. Cannon ..... 348

N.

New York Asbestos M'f'g Co., Trueb v. ..... 347

Page

New York Elevated R. R. Co., Sullivan v. ..... 168
New York Life Insurance & Trust Co. v. Cuthbert, Ives et al. ..... 377
New York, Ontario & Western Railway Co., Morris v. ..... 169
New York Security & Trust Co. v. Saratoga Gas & Electric Light Co. ..... 385
Niagara Falls Paper Co. v. Sterling ..... 251
Nolan, McNamara v. ..... 35
North, Brenen v. ..... 398

O.

Oliver, will of ..... 25
Orr v. Currie ..... 16
O'Sullivan v. N. Y. Elevated R. R. Co. ..... 168
O'Sullivan, Manhattan Railway Co. v. ..... 233

P.

Parke, *In re* ..... 196
People v. Levy ..... 390
People *ex rel.* Philips & Miller, resp. v. Wurster com'r etc. ..... 367
People *ex rel.* Pond v. Tamsen 141
Piqua Club Association, Mitchell v. ..... 139
Philips & Miller, resp. People *ex rel.* v. Wurster, com's. etc. 367
Pond, People *ex rel.* v. Tamsen. 141
Pratt, Stone v. ..... 176
Prentiss v. Bowden ..... 145
Publishers' Printing Co. v. Gillen Printing Co. ..... 327

Q.

Quinn, Estate of ..... 240
Quinn, Matter of ..... 226

R.

Reich, Cochran v. ..... 147
Ridgway v. Symons ..... 23
Ringle v. Wallis Iron Works ..... 261
Roe, Goelet v. ..... 87
Rogers, Hand v. ..... 254
Rouge v. Rouge ..... 103
Rouge, Rouge v. ..... 103
Ruppaner, Matter of ..... 159

S.

Sabin v. Kendrick ..... 280

Page

Salisbury v. Bennett ..... 306
Saratoga Gas & Electric Light Co., N. Y. Security & Trust Co. v. ..... 385
Sauer, Lynch v. ..... 287
Scholl, VanHatten v. ..... 247
Schwartz v. Scott ..... 53
Scott, Schwartz v. ..... 54
Sherman v. Green ..... 190
Spaulding v. American Wood-Board Co. ..... 376
Spies v. Michelsen ..... 188
Stanton v. United States Pipe Line Co. ..... 180
State of New York v. Equitable Mutual Fire Insurance Corp. ..... 210
Sterling, Niagara Falls Paper Co. v. ..... 251
Stevenson Brewing Co., Gallagher v. ..... 107
Stone v. Pratt ..... 176
Stowell's Estate, *In re* ..... 316
Sturz v. Fischer ..... 202
Sweeney, Bowen v. ..... 128
Symons, Ridgway v. ..... 23

T.

Tamsen, Corn v. ..... 238
Tamsen, People *ex rel.* Pond v. 141
Third Avenue Railroad Co., Feist v. ..... 257
Toole v. Board of Supervisors of Oneida Co. ..... 267
Treadwell Co., Gillig v. ..... 197
Treu, Harris v. ..... 93
Trueb *et al.* v. N. Y. Asbestos M'f'g Co. ..... 347

U.

Underhill v. Underhill ..... 374
Underhill, Underhill v. ..... 374
Underwood, Farmers' National Bank of Annapolis v. ..... 95
Union Dime Saving Institution, Dubois v. ..... 288
United States Pike Line Co., Stanton v. ..... 180

V.

Van Hatten v. Scholl ..... 247

W.

Wallis Iron Works, Ringle v. . 261
Winterson v. Hitchings ..... 1
Wurster, People *ex rel.* Philips & Miller, resp. v. ..... 367

# TABLE OF CASES CITED

## IN THE OPINIONS.

### A.


| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Abram French Co. v. Marx | 10 Misc. 383 | 13 |
| Adams v. Roberts | 1 Civ. Pro. 204 | 144 |
| Adams v. Spellman | 39 Hun, 35 | 158 |
| Adler v. Order, etc., of Baltimore | 26 Abb. 233 | 366 |
| Ahern v. Natl. S. S. Co. | 11 Abb. N. S. 356 | 289 |
| Allen v. Meyer | 73 N. Y. 1 | 105 |
| Argall v. Pitt | 78 N. Y. 239 | 4 |
| Arnold v. Cheeseborough | 33 Fed. Rep. 571 | 308 |
| Arrow Steamship Co. v. Bennett | 25 N. Y. Civ. Pro. 234 | 190 |
| Ashmore, Goods of, | 3 Curteis, 757 | 33 |
| Association v. Reed | 96 N. Y. 474 | 69 |
| Attorney, *In re* | 87 N. Y. 521 | 322 |
| Attorney General v. Continental Life Ins. Co. | 74 N. Y. 327, 330 | 405 |


### B.


| | | |
|---|---|---|
| Backus v. Kimball | 62 Hun, 122 | 300 |
| Bailey v. Murphy | 136 N. Y. 50 | 331 |
| Balcom v. Adams | 2 N. Y. Supp. 255 | 59 |
| Ball v. Miller | 17 How. Pr. 300 | 319 |
| Baltimore & Ohio R. R. Co. v. Arthur | 90 N. Y. 234 | 292 |
| Bank v. Hughes | 17 Wend. 94–98 | 405 |
| Bank v. Sheehan | 101 N. Y. 176 | 245 |
| Bank v. Todd | 52 N. Y. 489 | 322 |
| Banks v. Pugsley | 47 N. Y. 368 | 322 |
| Barnard v. Kobbe | 54 N. Y. 516 | 322 |
| Beach v. Mayor, etc | 14 Hun, 81 | 246 |
| Bean v. Smith | 2 Mason, 252, 284 | 298 |
| Beardsley v. Dodge | 143 N. Y. 160 | 371 |
| Beaver v. Taylor | 93 U. S. 46 | 115 |
| Beck v. Ryback | 9 How. Pr. 193 | 291 |
| Beebe v. Goodenough | 3 Hun, 73 | 46 |
| Bender v. Blessing | 82 Hun, 320 | 314 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Bender v. Sherwood | 17 How. Pr. 258 | 292 |
| Bennett v. Goble | 43 Hun, 354 | 24 |
| Bennett v. Van Syckel | 18 N. Y. 481 | 147 |
| Bengston v. Steamship Co. | 31 Hun, 96 | 69 |
| Bertles v. Noonan | 92 N. Y. 152 | 272 |
| Bienenstock v. Ammidown | 31 Abb. N. C. 409 | 47 |
| Billings v. Russell | 101 N. Y. 226 | 298 |
| Bingham, Matter of | 127 N. Y. 296 | 304 |
| Bloom v. Burdick | 1 Hill, 130 | 111 |
| Board of Underwriters v. Natl. Bank | 146 N. Y. 64 | 146 |
| Bogardus v. Clarke | 1 Edw. Chy. 266 | 133 |
| Bonynge v. Field | 81 N. Y. 159 | 350 |
| Bowe v. The Reflector Co. | 36 Hun, 407 | 236 |
| Bradford v. Fox | 38 N. Y. 289 | 406 |
| Braiser, *In re* | 2 How. Pr. N. S. 154 | 146 |
| Brand v. Goodwin | 15 Daly, 469 | 287 |
| Brick's Estate | 15 Abb. Pr. 12; s. c. 1 R. D. Smith, 17 | 135 |
| Bridesbury Manuf. Co.'s Appeal | 106 Penn. St. 275 | 292 |
| Brinkley v. Brinkley | 56 N. Y. 192 | 178 |
| Britton v. McDonald | 3 Misc. 514 | 195 |
| Bronson v. Munson | 29 Hun, 60 | 405 |
| Brookman v. Hamil | 43 N. Y. 554 | 261 |
| Brooklyn & Rockaway Beach R. R. v. Reid | 21 Hun, 273 | 378 |
| Brooks v. Wilson | 125 N. Y. 261 | 337 |
| Broome v. Taylor | 9 Hun, 155 | 110 |
| Brush v. Barrett | 16 Hun, 409 | 404 |
| Brush v. Brown | 103 N. Y. 684 | 13 |
| Bryan v. University Pub. Co. | 112 N. Y. 382 | 224 |
| Bullard v. Sherwood | 85 N. Y. 253 | 4 |
| Bunn v. Daily | 24 Hun, 526 | 382 |
| Burdick v. Freeman | 46 Hun, 133; aff'd 120 N. Y. 421, | 105 |
| Burgess v. Simonson | 45 N. Y. 25 | 338 |
| Burnham v. Jones | 110 N. Y. | 227 |
| Burns v. O'Neil | 10 Hun, 110 | 494 |
| Butler v. Benson | 1 Barb. 226 | 29 |
| Butler v. Evening Mail Ass'n | 61 N. Y. 634; reversing 34 Super. 58 | 351 |
| Byrne v. Van Hosen | 5 Johns. 65 | 107 |


C.


| | | |
|---|---|---|
| California v. Molitor | 113 U. S. 609 | 120 |
| Campbell v. Foster | 35 N. Y. 361 | 382 |
| Candee v. Lord | 2 N. Y. 269 | 336, 338 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Canfield v. Gayland | 12 Wend. 236 | 146 |
| Carlton v. Carlton | 85 N. Y. 313 | 20 |
| Carlton v. Carlton | 23 Hun, 251 | 401 |
| Carman v. Plass | 23 N. Y. 286 | 220 |
| Carpenter v. Osborne | 102 N. Y. 552 | 338 |
| Carr v. Rischer | 119 N. Y. 117 | 71 |
| Carris v. Carris | 24 N. J. Eq. 532 | 40 |
| Carter v. Bowe | 47 Hun, 628 | 285 |
| Cavell v. Hart | 14 Hun, 252 | 350 |
| Chamberlain v. O'Conor | 1 E. D. Smith, 665 | 292 |
| Chamley v. Dunsany | 2 Sch. & Lef. 690, 714 | 298 |
| Chapin v. Thompson | 16 Hun, 53 | 245 |
| Chapman v. Forbes | 123 N. Y. 532 | 333, 339 |
| Chase v. Lawson | 36 Hun, 221 | 20 |
| Cheeney v. Arnold | 18 Barb. 438 | 29 |
| Chiles, *In re* | 22 Wall. U. S. 157 | 118 |
| Church v. Howard | 17 Hun, 10 | 314 |
| Churchman v. Merritt | 50 Hun, 270 | 53 |
| Churchman v. Merritt | 51 Hun, 375 | 195 |
| Clapp v. Graves | 2 Hilt. 243 | 287 |
| Clark v. Dillon | 94 N. Y. 370 | 347 |
| Clarke v. City | 34 N. Y. 356 | 146 |
| Clarke v. Clarke | 11 Abb. P. R. 228 | 41 |
| Clason v. Baldwin | 18 N. Y. Sup. 371 | 8 |
| Colberg v. Emerson | Law Journal, March 6, 1894 | 236 |
| Colgrove v. Railroad Co | 20 N. Y. 492 | 278 |
| Coleman, *In re* | 111 N. Y. 220 | 172 |
| Commercial Tel. Co. v. Smith | 57 Hun, 176 | 140, 331 |
| Cook v. Jenkins | 79 N. Y. 575 | 379 |
| Cort v. Campbell | 82 N. Y. 509 | 71 |
| Crane v. McDonald | 118 N. Y. 648 | 292 |
| Cronin v. Crooks | 143 N. Y. 352 | 17, 203, 205 |
| Cronin v. Cronin | 9 Civ. Pro. Rep. 137 | 291 |
| Crotty v. Kimbal | 23 W. Dig. | 231 |
| Cuthbert v. Chauvet | 136 N. Y. 326 | 127 |


D.


| | | |
|---|---|---|
| Decker v. Decker | 108 N. Y. 128 | 338 |
| DeMeli v. DeMeli | 120 N. Y. 485 | 208 |
| Despard v. Churchill | 53 N. Y. 142 | 373 |
| Devlin v. The Mayor | 27 Abb. N. C. 311 | 8 |
| DeWitt v. Buchanan | 44 Barb. 31 | 105 |
| Dickerson v. Cook | 16 Barb. 509 | 106 |
| Dietlin v. Regan | 46 N. Y. St. Rep. 763 | 37 |
| Dimmick v. Cooley | 3 N. Y. Civ. Pro. 141 | 330 |
| Dodge v. Lawson | 22 Civ. Pro. Rep. 112 | 292 |
| Donadi v. N. Y. S. M. Co. | 2 E. D. Smith, 519 | 51 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Douglas v. Leonard | 44 St. Rep. 298 | 255 |
| Douglass v. Meyer | 21 N. Y. Supp. 1091 | 195 |
| Dowdney v. Volkening | 87 Supr. Ct. 313, 316 | 189 |
| Downes v. Phoenix Bank | 6 Hill, 299 | 111 |
| Drago v. Smith | 92 Hun, 586 | 329 |
| Duckworth v. Roach | 81 N. Y. 49 | 312 |
| Dudley v. Press Pub. Co. | 58 Hun, 47; 58 Id. 18 | 97 |
| Dunford v. Weaver | 84 N. Y. 452 | 142 |
| Dunham v. Insurance Co. | 44 N. Y. Super. 337 | 97 |
| Dupuy v. Wurts | 53 N. Y. 556 | 208 |
| Dutchess County Mut. Ins. Co. v. Van Wagoner | 132 N. Y. 404 | 178 |
| Diplock v. Hammond | L. J. Ch. 550; s. c. 28 Eng. Law & Eq. 202 | 202 |

E.

| | | |
|---|---|---|
| Eiling v. Dayton | 43 St. Rep. 263 | 277 |
| Empire City Bank, *In re* | 18 N. Y. 220 | 344 |
| Everitt v. Everitt | 41 Barb. 385 | 29 |

F.

| | | |
|---|---|---|
| Fargo v. Arthur | 43 How. Pr. 193 | 293 |
| Fargo v. Helmer | 43 Hun, 17 | 245 |
| Farr v. Farr | 2 McArthur, 36 | 40 |
| Fatman v. Fatman | 18 N. Y. Supp. 847 | 245 |
| Ferrin v. Merrick | 41 N. Y. 315 | 82, 83 |
| Field, *In re* | 131 N. Y. 184 | 281 |
| Field v. Schieffelin | 7 Johns. Ch. 150 | 107 |
| Fisk v. Board | 69 Hun, 212 | 91 |
| First National Bank of Canandaigua v. Martin | 47 Hun, 571 | 332 |
| Flanders v. Town of Merrimack | 47 Wis. 567 | 352 |
| Fleischman v. Stern | 90 N. Y. 110 | 90 |
| Foland v. Dayton | 20 Week. Dig. 59 | 350 |
| Foote v. Lathrop | 41 N. Y. 358 | 13 |
| Foster v. Persch | 68 N. Y. 400 | 351 |
| Fox v. Moyer | 54 N. Y. 125 | 298 |
| Frick v. White | 57 N. Y. 107 | 4 |

G.

| | | |
|---|---|---|
| Gardner v. Keteltas | 3 Hill, 330 | 88 |
| Garson v. Brumbery | 75 Hun, 336 | 204 |
| Garvey v. Owens | 115 N. Y. 671 | 164 |
| Gates v. De la Mare | 142 N. Y. 307 | 351 |
| Gault v. Dupault | 4 Can. Legal News, 321 | 204 |
| Genet v. Canal Co. | 113 N. Y. 472 | 389 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Genett v. Davenport | 59 N. Y. 548 | 147 |
| Gildersleeve v. Lester | 68 Hun, 535 ; aff'd 139 N. Y. 608. | 142 |
| Glasner v. Weisburg | 43 Mo. App. 214 | 292 |
| Glyn v. Duesbury | 11 Simons, 139 | 292 |
| Goddard v. Trendoth | 24 Hun, 182 | 390 |
| Goodsell v. W. U. Tel. Co | 109 N. Y. 147 | 158 |
| Gordon v. Fox | 18 Civ. Pro. Rep. 291 | 281 |
| Gorlitz v. Board | 52 Super. 520 | 91 |
| Gouraud, Matter of | 95 N. Y. 256 | 187 |
| Grant v. Birdsall | 2 Civ. Pro. Rep. 422 | 248 |
| Gregor v. Buell | 17 Abb. Pr. 31 | 146 |
| Green v. Bates | 7 How. Pr. 206 | 166 |
| Gribbon v. Freel | 93 N. Y. 96 | 179 |
| Grow v. Garlock | 29 Hun, 598 | 387 |
| Guiliano v. Whitenack | 9 Misc. 562 | 331 |


## H.


| | | |
|---|---|---|
| H. B. Construction Co. v. N. Y. C. & H. R. R. R. Co | 145 N. Y. 390 | 335, 341 |
| Hackett v. Patterson | (Com. Pleas) 16 N. Y. Supp. 170. | 87 |
| Hager v. Shindler | 29 Cal. 48 | 298 |
| Hale v. St. Lawrence Mfg. Co | 36 Hun, 499 | 94 |
| Hall, *In re* | 32 N. Y. Supp. 883 | 121 |
| Hall v. Pettigrove | 10 Hun, 609 | 63, 298 |
| Hanlon v. Insurance Co | 9 Misc. 70 | 258 |
| Hardman v. Sage | 124 N. Y. 35 | 315 |
| Harker v. Anderson | 21 Wend. 382, 383 | 406 |
| Harper v. Fairley | 53 N. Y. 445 | 314 |
| Harry v. Hilton | 11 Daly, 232 | 350 |
| Hart v. Kipp | 148 N. Y. 306; rev'g 74 Hun, 412, | 307 |
| Hayden v. Bank | 130 N. Y. 146 | 157, 160 |
| Hayes v. Davidson | 98 N. Y. 19 | 284 |
| Heckman v. Pinkney | 81 N. Y. 211 | 395 |
| Heishon v. Insurance Co | 77 N. Y. 275 | 58 |
| Heishon v. Insurance Co | 77 N. Y. 278 | 246 |
| Herrera v. Barreto | Law Journal, May 10, 1894 | 236 |
| Herrick v. Woolverton | 41 N. Y. 581, 589 | 406 |
| Higgins v. Crichton | 98 N. Y. 626 | 165 |
| Hiles v. Fisher | 144 N. Y. 306 | 272 |
| Hobson v. Dale | 95 N. Y. 610 | 165 |
| Holbrook v. Orgle | 49 How. 289 | 398 |
| Holden, *In re* | 126 N. Y. | 15 |
| Holmes v. Seeley | 17 Wend. 78 | 107 |
| Home Ins. Co. v. Smith | 28 Hun, 296 | 351 |
| Hope v. T. & L. R. R. Co | 40 Hun, 438 | 173 |
| Hope v. Troy & Lansingburgh R. R. Co | 40 Hun, 498; aff'd 110 N. Y. 643. | 114 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Hosack v. Rogers | 11 Paige, 608 | 119 |
| Howe v. Welch | 11 N. Y. Civ. Pro. 444 | 395 |
| Howitt v. Merrill | 113 N. Y. 630 | 331 |
| Hoyt v. Long Island R. R. Co | 57 N. Y. 678 | 114 |
| Huerzeler v. C. C. T. R. R. Co | 139 N. Y. 490 | 115 |
| Hume v. Burton | 1 Ridg. P. C. 277 | 133 |
| Huntington v. Moore | 59 Hun, 351 | 373 |
| Hurd v. Callahan | 9 Abb. N. C. 374 | 319 |
| Hinds v. Kellogg | 133 N. Y. 536 | 8 |
| Hutchins v. Brand | 6 How. P. R. 72 | 111, 112 |

I.

| | | |
|---|---|---|
| Imbert v. Hallock | 23 How. P. R. 456 | 88 |
| Indianapolis, etc., R. R. v. Horst | 93 U. S. 300 | 309 |
| Insurance Co. v. Scott | 2 Hilt. 550 | 88 |
| Isham v. Davidson | 3 T. & C. 745 | 165 |

J.

| | | |
|---|---|---|
| Jackson v. Hickory | 1 Wend. 406 | 28 |
| Jackson v. Jackson | 39 N. Y. 153 | 30 |
| Jackson v. La Grange | 19 John. | 28 |
| Jackson v. Purchase | 1 Hilt. 357 | 287 |
| Jacobs v. Zeltner | 9 Misc. 455 | 259 |
| Jacquin v. Jacquin | 36 Hun, 378 | 120 |
| Jaunsey v. Thorne | 2 Barb. Chy. 59 | 28 |
| Jenkins v. Putman | 106 N. Y. 275 | 178 |
| Jennings v. Miller | 10 Wisc. 762 | 259 |
| Jerome v. Flagg | 48 Hun, 351 | 20 |
| Johnson v. Farrell | 40 Abb. Pr. 384 | 146 |
| Johnson v. The Hardwood Door & Trim Co | 79 Hun, 407 | 334 |
| Johnston v. Donvan | 106 N. Y. 269 | 124 |
| Jones v. Jones | 120 N. Y. 589 | 138 |
| Judson v. Gray | 11 N. Y. 408 | 350 |

K.

| | | |
|---|---|---|
| Keenan v. Brooklyn City R. R | 145 N. Y. 348 | 250 |
| Keenig v. N. Y. Life Ins. Co | 14 Civ. Pro. Rep. 269 | 292 |
| Kennedy v. N. Y. Life Ins. & Trust Co | 101 N. Y. | 18 |
| Kennedy v. N. Y. Life Ins. & Trust Co | 101 N. Y. 489 | 401 |
| Keyes v. Ellensohn | 82 Hun, 13 | 161 |
| Kibbe v. Witmore | 31 Hun, 424 | 179 |
| King v. Londale | 2 Burr. 447 | 344 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Kingsland v. Murray | 133 N. Y. 170 | 303, 317 |
| Kimball v. Thompson | 58 Mass. 411 | 298 |
| Kissam v. Marshall | 10 Abb. Pr. 424 | 179 |
| Knapp, *In re* | 85 N. Y. 284 | 322 |
| Knapp v. Green | 79 Hun, 264, 267 | 405 |
| Knapp v. Roche | 94 N. Y. 239 | 153 |
| Knox v. Baldwin | 80 N. Y. 610 | 312 |
| Koehler v. Campbell | Law J., May 22, 1894 | 120 |
| Kress v. Seligman | 8 Barb. 439 | 190 |
| Krill v. Brownell | 40 Hun, 72 | 352 |

L.

| | | |
|---|---|---|
| Ladenburg v. Com. Bank of Newfoundland | 87 Hun, 269 | 20, 224, 225, 364 |
| Larkins v. Maxon | 103 N. Y. 680 | 352 |
| Lawrence v. Norton | 45 Barb. 448 | 29 |
| Lazarus v. Met. El. R. R. Co | 145 N. Y. 581 | 106 |
| Lee v. Pfeffer | 25 Hun, 97 | 334 |
| Lee v. Vacuum Oil Co | 126 N. Y. 587 | 328 |
| Lent v. N. Y. & M. R. R. Co | 130 N. Y. 510 | 149, 151 |
| Levy v. Buel | 47 Hun, 350 | 382 |
| Little v. Bank | 2 Hill, 425 | 382, 406 |
| Locklin v. Moore | 57 N. Y. 360 | 151 |
| Lockwood v. Bentley | 31 Hun, 155 | 20 |
| Long v. Long | 17 Abb. N. C. 308 | 40 |
| Long v. Rogers | 79 Hun, 441 | 136, 160 |
| Losee v. Bullard | 79 N. Y. 404 | 311 |
| Lorillard v. Clyde | 86 N. Y. 384 | 347 |
| Lyle v. Murray | 4 Sand. 594, 595 | 406 |

M.

| | | |
|---|---|---|
| McCracken v. Flanagan | 127 N. Y. 493 | 19 |
| McGovern v. Railroad Co | 67 N. Y. 418 | 251 |
| McKellar v. Rogers | 9 N. Y. Civ. Pro. 6 | 378 |
| McKinney v. Grand St. R. R. Co | 104 N. Y. 352 | 172 |
| McKyring v. Bull | 16 N. Y. 297 | 150, 151 |
| McMullen v. Rafferty | 89 N. Y. 456 | 314 |
| McQueen v. Babcock | 3 Abb. Ct. App. 132 | 308 |
| Manufacturing Co. v. Trowbridge | 68 Hun, 22 | 69 |
| Marie v. Garrison | 83 N. Y. 14 | 347 |
| Marsh, Matter of | 45 Hun, 107 | 31 |
| Martin Cantine Co. v. Warshauer | 7 Misc. 412 | 120, 121 |
| Marx v. Man. R. R. Co | 56 Hun, 575 | 173 |
| Matter of Hynes | 105 N. Y. 560 | 107 |
| Matter of New York Institution | 121 N. Y. 284 | 395 |
| Meaddowcroft v. Sutton | 1 Bos. & Pull. 61 | 71 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Meeker v. Claghorn | 44 N. Y. 349 | 351 |
| Milliken v. Telegraph Co | 110 N. Y. 403 | 347 |
| Mills v. Martin | 19 John. 733 | 111 |
| Mitchell v. Reed | 61 N. Y. 123 | 87 |
| Moench v. Yung | 18 Civ. Pro. 259 | 344 |
| Moffatt v. Herman | 17 Abb. N. C. 107 | 121 |
| Montgomery v. Clark | 2 Atk. 378 | 133 |
| Moore v. Hamilton | 44 N. Y. 666 | 127 |
| Moore v. Usher | 7 Simons, 383 | 293 |
| Morrowsky v. Kohrig | 4 Misc. 167 | 277 |
| Moulton v. Bowker | 115 Mass. 37 | 350 |
| Muir v. Schenck | 3 Hill, 232 | 46 |
| Murphy v. Lippe | 3 J. & S. 542 | 110 |
| Murray v. Gibson | 22 Hun, 386 | 330 |
| Murray v. Judah | 6 How. 490 | 406 |

N.

| | | |
|---|---|---|
| Naughton v. Vion | 91 Hun, 360 | 400 |
| Neass v. Mercer | 15 Barb. 318 | 106 |
| Neil v. Martin | 24 Hun, 645 | 248 |
| N. E. Mutual Life Ins. Co. v. Odell | 50 Hun, 279 | 293 |
| N. Y. L. & W. R. R. Co., *In re* | 99 N. Y. 12 | 69 |
| Nobis v. Pollock | 6 N. Y. Supp. 273 | 62 |
| Nolan, *In re* | 24 N. Y. Supp. 298 | 195 |

O.

| | | |
|---|---|---|
| O'Brien v. Insurance Co | 56 N. Y. 52 | 153 |
| O'Connor v. Gifford | 117 N. Y. 278 | 81 |
| O'Hare, Matter of | 2 Law Bul. 83 | 32 |
| Oliwell v. Vanderhalven | 26 St. Rep. 115 | 330 |
| Osterhoudt v. Board of Supervisors | 98 N. Y. 239 | 125 |
| Outhouse v. Odell | 84 Hun, 494 | 352 |

P.

| | | |
|---|---|---|
| Pach v. Gilbert | 124 N. Y. 612 | 201 |
| Packard v. Stephens | 85 Hun, 197 | 350 |
| Paget v. Stevens | 143 N. Y. 172 | 224 |
| Palen v. Starr | 7 Hun. 422 | 350 |
| Palmer v. Lorillard | 16 Johns. 348 | 261 |
| Palmer v. Palmer | 36 Mich. 487 | 406 |
| Palmer v. Palmer | 3 App. Div. 213 | 375 |
| Park v. Park | 80 N. Y. 156 | 142 |
| Patrie, *In re* | 82 Hun, 62 | 314 |
| Patten v. Stitt | 50 N. Y. 591 | 146 |
| Patterson v. Naehr | 16 Civ. Pro. Rep. 449 | 259 |
| Patterson v. Patterson | 59 N. Y. 574 | 82, 83 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Patterson v. Perry | 14 How. Pr. 505 | 292 |
| Pease v. Delaware, L. & W. R. R. Co. | 10 Daly, 459 | 112 |
| Peaslee, Matter of | 73 Hun, 113 | 160 |
| Peck, *In re.* | 3 Redf. 345 | 319 |
| Peiffer v. Wheeler | 76 Hun, 280 | 174 |
| People v. Albany & Vermont R. R. Co. | 77 N. Y. 232 | 334 |
| People v. Andrews | 52 N. Y. 445 | 88 |
| People v. Board | 3 Hun, 177 | 91 |
| People v. Board | 107 N. Y. 235 | 91 |
| People v. Brady | 53 N. Y. | 298 |
| People v. Campbell | 18 Abb. Pr. 1 | 259 |
| People v. Claflin | 104 N. Y. 96 | 91 |
| People v. Coleman | 41 Hun, 307 | 351 |
| People v. Common Council | 78 N. Y. 33, 39 | 91 |
| People v. Court of Oyer, etc. | 101 N. Y. 245 | 117 |
| People v. Deming | 1 Hilt. 271 | 303 |
| People v. French | 110 N. Y. 494 | 90 |
| People v. Justices, etc. | 78 Hun, 334 | 91 |
| People v. Martin | 13 Miss. 21 | 91 |
| People v. Nostrand | 46 N. Y. 375 | 127 |
| People v. Oyer & Terminer | 36 Hun, 277 | 120 |
| People v. Platt | 117 N. Y. 159 | 208 |
| People v. Schermerhorn | 19 Barb. 558 | 344 |
| People v. Spicer | 99 N. Y. 233 | 106 |
| People v. Supervisors, etc.' | 65 N. Y. 390 | 106 |
| People *ex rel.* Cassanah v. McAdam | 28 Hun, 284 | 178 |
| People *ex rel.* Lefever v. Supervisors of Ulster Co | 34 N. Y. 268 | 173 |
| People *ex rel.* Negus v. Dwyer | 90 N. Y. 402 | 304 |
| People *ex rel.* N. Y. C. & H. R. R. R. Co. v. Cook | 62 Hun, 303 | 179 |
| People *ex rel.* Peck v. Commissioners, etc. | 106 N. Y. 64 | 371 |
| People *ex rel.* Press Pub. Co. v. Martin | 142 N. Y. 228 | 371 |
| People *ex rel.* Breslin v. Lawrence | 107 N. Y. 607 | 227 |
| Pepoon, Matter of | 91 N. Y. 285 | 29 |
| Pitcher v. Robertson | 21 N. Y. Supp. 66 | 320 |
| Pollett v. Long | 56 N. Y. 201 | 136 |
| Pollock v. Ehle | 2 E. D. Smith, 541 | 62, 293 |
| Pond v. Curtiss | 7 Wend. 45 | 107 |
| Poole v. Belcha | 131 N. Y. 200 | 320 |
| Powers' Case | 37 St. Rep. 893 | 165 |
| Progressive Handlanger Union No. 1 v. German Savings Bank | 25 J. & S. 594 | 202 |
| Public School, Matter of | 47 N. Y. 561 | 364 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Putnam Co. Chemical Works v. Jochem | 8 N. Y. Civ. Pro. | 50 |

Q.

| | | |
|---|---|---|
| Quin v. Lloyd | 41 N. Y. 349 | 151 |

R.

| | | |
|---|---|---|
| Railroad Co. v. Collins | 3 Lans. 33 | 406 |
| Randall v. Packard | 142 N. Y. 47 | 241 |
| Randolph v. Mayer | 53 How. Pr. 68 | 144 |
| Raplee v. Wilkin | 5 Week. Dig. 560 | 278 |
| Read v. Nichols | 108 N. Y. 224 | 115 |
| Record v. Vill. of Saratoga Spr'gs | 46 Hun, 448; aff'd 120 N. Y. 646 | 114 |
| Record v. Vill. of Saratoga Spr'gs | 46 Hun, 448 | 174 |
| Rector v. Vanderbilt | 98 N. Y. 170 | 315 |
| Reitzenstein v. Marquardt | 75 Iowa, 294 | 406 |
| Reynolds v. Reynolds | 3 Allen, 606 | 40, 41 |
| Richardson v. Ainsworth | 20 How. Pr. 531 | 46 |
| Rider v. Legg | 51 Barb. 260 | 32 |
| Robertson v. Barnum | 29 Hun, 657 | 55 |
| Robinson v. Oceanic St'm Nav. Co. | 112 N. Y. 15 | 115 |
| Roderigas v. East River Sav. Inst. | 63 N. Y. 460 | 112 |
| Rodman v. Henry | 17 N. Y. 482 | 322 |
| Rogers v. Rogers | 3 Wend. 505 | 134 |
| Root v. Great Western Ry. Co. | 65 Barb. 619; s. c., 1 T. & C. 10; aff'd 55 N. Y. 636 | 112 |
| Rosenberg v. Solomon | 144 N. Y. 92 | 125, 333, 339 |
| Rosenthall v. Grouse | 12 Daly, 532 | 260 |
| Rosseau v. Bleau | 131 N. Y. 177 | 172 |
| Roy v. Bancus | 43 Barb. 310 | 46 |
| Rugg v. Rugg | 83 N. Y. 494 | 29 |
| Russner v. Railroad Co | 114 N. Y. 433 | 251 |
| Rutherford v. Holmes | 5 Hun, 317; aff'd 66 N. Y. 368 | 120 |
| Rutherford v. Town of Madrid | 77 Hun, 545 | 24 |

S.

| | | |
|---|---|---|
| St. John v. McKee | 3 Dem. 236 | 80 |
| Sacket v. Newton | 10 How. 561 | 392 |
| Sanders v. Soulter | 120 N. Y. 193 | 347 |
| Sanford v. Granger | 12 Barb. 392 | 261, 319 |
| Sartwell v. Field | 68 N. Y. 341 | 105 |
| Schmidt, Matter of | 77 Hun, 201 | 43 |
| Schrauth v. Bank | 86 N. Y. 390 | 46 |
| Schultz v. Pulver | 11 Wend. 363 | 81 |
| Schultheis v. McInerny | 13 N. Y. Supp. 684 | 62 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Schwartz v. Wechler | 49 St. Rep. 145 | 260 |
| Seaman v. Duryea | 11 N. Y. 324 | 142 |
| Seaman v. Low | 17 Supr. 337 | 190 |
| Sears v. Sears | 9 Civ. Pro. 432 | 383 |
| Sherman v. People | 100 N. Y. 351 | 119 |
| Sibloy v. Equitable Life Ass. Soc. | 24 J. & S. 274 | 292 |
| Simon v. Aldine Publishing Co | 14 Daly, 279 | 121 |
| Sing Sing, Matter of Main St. | 98 N. Y. 454 | 352 |
| Smedis v. Rockaway Beach R. R. Co. | 88 N. Y. 13 | 115 |
| Smith v. Dittenhœfer | 1 City Ct. R. 143 | 146 |
| Smith v. Miller | 52 N. Y. 545–548 | 406 |
| Smith v. Miller | 43 N. Y. 171–175 | 405, 406 |
| Smith v. Ryan | 66 N. Y. 356 | 314 |
| Smith v. Zalinski | 26 Hun, 225; aff'd 94 N. Y. 519. | 165 |
| Soria v. Davidson | 21 J. &S. 52; s. c. 9 N. Y. Civ. Pro. 23 | 110 |
| Soule, Matter of | 19 St. Rep. 532 | 160, 162 |
| Southwick v. Southwick | 49 N. Y. 517 | 106 |
| Spears v. Mayor, etc. | 72 N. Y. 442 | 178 |
| Stedeker v. Bernard | 102 N. Y. 330 | 256 |
| Stafford v. Richardson | 15 Wend. 304–306 | 406 |
| Steers v. Liverpool, N. Y. & P. S. S. Co. | 57 N. Y. 1 | 112 |
| Stevens v. Glover | 83 N. Y. 611 | 90 |
| Stevenson v. N. Y. Lake Erie & W. R. R. | 49 Hun, 169 | 55 |
| Story v. N. Y. & H. R. R. Co. | 6 N. Y. 85 | 156 |
| Sturges *et al.*, as Board of Comm'rs of Pilot v. Shottard, etc. | 58 N. Y. 103 | 36 |
| Sturtz v. Fisher | N. Y. Law Journal, Jan. 21, 1896 | 194 |
| Sulzbacher v. Cawthra | 36 N. Y. Supp. 78 | 366 |
| Supervisors Saratoga Co. v. Seaburg | 11 Abb. 461 | 292 |
| Sweeney v. Sturgis | 24 Hun, 162 | 195 |
| Sylvester v. Ralston | 31 Barb. 286 | 108 |


## T.


| | | |
|---|---|---|
| Taylor v. Smith | (Supreme Ct.) 11 N. Y. Supp. 29 | 376 |
| Thacker v. Henderson | 63 Barb. 271 | 107 |
| The Thames & Mersey Ins. Co. v. Dimmick | 51 St. Rep. 41 | 179 |
| Thomas, Goods of | 1 Swabey & Tristram, 255 | 32 |
| Thomas v. Gould | 16 Abb. Pr. N. S. 424 | 232 |
| Thornton v. Tuttle | 7 St. Rep. 801 | 351 |
| Throop Grain Cleaner Co. v. Smith | 110 N. Y. 83 | 299 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| Thuring v. Thuring | 18 How. Pr. 458 | 187 |
| Townsend v. Norris | 7 Hun, 239 | 110 |
| Treaner v. Man. R. R. Co | 28 Abb. N. C. 47 | 173 |
| Trull v. Granger | 8 N. Y. 115 | 88 |

U.

| | | |
|---|---|---|
| Underhill, *In re* | 117 N. Y. 471 | 84 |
| Underhill v. Crawford | 29 Barb. 664 | 166 |
| Union Square Bank v. Reichman | Law Journal, Sept. 11, 1895 | 236 |
| U. S. Life Ins. Co. v. Jordan | 46 Hun, 201 | 4 |
| United States v. Sanders | Hemp. 483 | 112 |

V.

| | | |
|---|---|---|
| Vale v. Railroad | 12 N. Y. Civ. Pro. 103 | 376 |
| Van Alstyne v. Erwine | 11 N. Y. 331 | 204 |
| Vanderheyden v. Reid | 1 Hopk. 408 | 134 |
| Van Pelt v. Etter | 2 Sweeney, 202 | 110 |
| Van Slyke v. Hyatt | 46 N. Y. 259 | 127 |
| Van Zandt v. Van Zandt | 26 St. Rep. 963; s. c. 17 Civ. Pro. Rep. 448 | 292 |
| Verona Co. v. Murtaugh | 50 N. Y. 314 | 118 |
| Victory Co. v. Beecher | 97 N. Y. 651 | 311 |
| Village of Mayville v. Wilcox | 61 Hun, 223 | 393 |
| Voorhis, Matter of | 125 N. Y. | 27 |
| Vulcan v. Myers | 58 Hun, 161 | 69 |

W.

| | | |
|---|---|---|
| Waldron v. Walker | 43 St. Rep. 665 | 322 |
| Wallace v. Bassett | 41 Barb. 92 | 398 |
| Wallace v. Dimmick | 24 Hun, 635 | 383 |
| Ward v. Craig | 87 N. Y. 550 | 322 |
| Warner v. Bank | 115 N. Y. 251 | 156 |
| Washoe Tool Co. v. Ins. Co | 7 Hun, 77; aff'd 66 N. Y. 613 | 166, 167 |
| Waterman v. Whitney | 11 N. Y. 151 | 31 |
| Watson, Matter of | 69 N. Y. 536 | 118 |
| Watson v. Brooklyn City R. R. | 103 N. Y. 687 | 250 |
| Webster v. Bond | 9 Hun, 437 | 341 |
| Weeks v. Tomes | 16 Hun, 349 | 400 |
| Weisse v. New Orleans | 10 La. Ann. 46 | 350 |
| Welde v. Henderson | 10 Civ. Pro. 214 | 383 |
| Wensley v. Randolph | 9 Misc. 457 | 260 |
| Werner v. Tuch | 119 N. Y. 632 | 387 |
| West Side Bank v. Pugsley | 47 N. Y. 368 | 46 |
| Westervelt v. Agramaris | 58 Hun, 147 | 233 |
| Wetmore v. Porter | 92 N. Y. 76 | 121 |

| Cases. | Where Reported. | Page Cited. |
|---|---|---|
| White v. Southerland | 2 Alb. Law J. 50 | 406 |
| Whitney v. Davis | 88 Hun, 168 | 300 |
| Wilbur v. Warren | 104 N. Y. 192 | 405 |
| Wilkins v. Raplee | 52 N. Y. 248 | 146 |
| Williams v. Ingersol | 89 N. Y. 599 | 322 |
| Williamson-Stewart Paper Co. v. Bobyshell | 14 Mo. App. 534 | 350 |
| Wilson v. McGregor | 34 St. Rep. 775 | 103 |
| Winston v. English | 44 How. 398 | 195 |
| Winchell v. Hicks | 13 N. Y. 568 | 314 |
| Witcher v. Tribune Association | 14 N. Y. Supp. 291 | 96 |
| Wolf v. Goodhue Fire Ins. Co | 43 Barb. 400; aff'd. 41 N. Y. 620, | 110 |
| Wood v. Byington | 2 Barb. Chy. 387 | 318 |
| Wood v. Phillips | 11 Abb. N. S. 1 | 71 |
| Woodward v. Bugsbee | 2 Hun, 683 | 288 |
| Woolsey, *In re* | 95 N. Y. 141 | 165 |
| Wright v. Cabot | 89 N. Y. 570 | 46 |

Y.

| | | |
|---|---|---|
| Yates v. People | 6 Johns. 337 | 220 |
| Yates County Natl. Bank v. Carpenter | 119 N. Y. 550 | 270 |
| Young v. Brunk | 28 N. Y. 667 | 80 |
| Young v. Hermans | 66 N. Y. 347 | 333 |

Z.

| | | |
|---|---|---|
| Zoller v. Smith | 45 Hun, 319 | 344 |
| Zountlein v. Bram | 100 N. Y. 12 | 272 |

# STATUTES, ETC., CITED.

## SECTIONS OF THE CODE OF CIVIL PROCEDURE CITED.


| Section | Page |
|---|---|
| Chapter 7, Title 3, Art. 2 | 295 |
| 2 | 394 |
| 3, subd. 6 | 259 |
| 4 | 394 |
| 14, subd. 2 | 117, 275 |
| 17 | 354 |
| 66 | 328 |
| 120 | 221 |
| 292 | 106 |
| 382 | 404 |
| 383, subd. 3 | 311 |
| 384 | 307 |
| 401 | 207, 309 |
| 410 | 404, 405 |
| 415 | 311 |
| 416 | 105 |
| 417 | 383 |
| 418 | 383 |
| 424 | 333 |
| 427 | 112 |
| 428 | 308 |
| 432, subd. 3 | 50 |
| 435 | 209 |
| 435, subd. 3 | 182 |
| 438 | 209, 224, 395 |
| 439 | 224 |
| 446 | 348 |
| 451 | 221, 247 |
| 452 | 123, 125, 126, 293, 333, 335, 339 |
| 453 | 123, 125, 126 |
| 454 | 219 |
| 455 | 220 |
| 456 | 220, 335, 457 |
| 457 | 335 |
| 458–467 | 36 |
| 460 | 36, 37 |
| 488 | 347 |
| 488, subd. 4 | 218 |
| 490 | 218 |
| 501 | 220 |
| 502, subd. 3 | 108 |
| 522 | 144 |
| 531 | 189 |
| 532 | 265 |
| 544 | 165, 166 |
| 546 | 348 |
| 550 | 232 |
| 578 | 71 |
| 587 | 71 |
| 596 | 71 |
| 603 | 395, 396 |
| 611–619 | 395, 396 |
| 635 | 103, 308 |
| 636 | 49, 205, 395, 396 |
| 638 | 50, 281 |
| 641 | 178, 203 |
| 644 | 200 |
| 649, subd. 3 | 157, 158 |
| 649, subd. 4 | 299 |
| 655, subd. 2 | 299 |
| 688 | 236 |
| 697 | 200 |
| 709 | 236 |
| 713 | 216 |
| 723 | 179, 384 |
| 724 | 259, 384 |
| 755–760 | 126 |
| 757 | 71, 164, 165, 166 |
| 772 | 194 |
| 783 | 127 |
| 811 | 346 |
| 814 | 265, 266 |
| 820 | 291, 293 |
| 827 | 395 |
| 834 | 114, 170 |
| 844 | 184, 185 |
| 870 | 243, 244 |
| 872 | 244 |
| 873 | 57, 99 |
| 885 | 396 |
| 970 | 138 |
| 971 | 353 |
| 974 | 378 |

| Section | Page |
|---|---|
| 982 | 376 |
| 983 | 376 |
| 986 | 376 |
| 1011 | 396 |
| 1013 | 395, 396 |
| 1015 | 395, 396 |
| 1022 | 8, 9, 60, 61, 62, 297, 300 |
| 1186 | 110 |
| 1200 | 146 |
| 1204 | 220 |
| 1205 | 220, 256 |
| 1207 | 400 |
| 1215 | 4, 396 |
| 1216 | 308 |
| 1217 | 308 |
| 1223 | 4 |
| 1228 | 10 |
| 1241, subd. 4 | 142 |
| 1260 | 140 |
| 1279 | 398 |
| 1317 | 127 |
| 1331 | 386 |
| 1347 | 234, 355 |
| 1356 | 364 |
| 1357 | 364 |
| 1398 | 269 |
| 1406 | 200 |
| 1407 | 200 |
| 1421 | 284 |
| 1424 | 285 |
| 1532 | 230 |
| 1537 | 130, 136, 137 |
| 1538 | 375 |
| 1540 | 229, 230 |
| 1544 | 138 |
| 1629 | 64, 239 |
| 1630 | 63, 64, 238, 239 |
| 1632 | 125 |
| 1670 | 125, 399 |
| 1695 | 232 |
| 1722 | 232 |
| 1743 | 40 |
| 1776 | 69 |
| 1780 | 110, 224, 225, 336 |
| 1785 | 211 |
| 1786 | 211 |
| 1788 | 211 |
| 1810 | 211 |
| 1902 | 249 |
| 1904 | 249 |
| 2059 | 226 |
| 2125 | 90 |
| 2135 | 370 |
| 2138 | 370 |
| 2140 | 90 |
| 2235 | 88 |
| 2244 | 108 |
| 2247 | 322 |
| 2262 | 93 |
| 2265 | 93 |
| 2280 | 142 |
| 2285 | 118 |
| 2325 | 196 |
| 2432 | 394 |
| 2433 | 394 |
| 2434 | 394 |
| 2442 | 394, 397 |
| 2463 | 382 |
| 2472 subd. 3 | 84 |
| 2510 | 75 |
| 2517 | 76 |
| 2520 | 76 |
| 2532 | 77 |
| 2545 | 61 |
| 2546 | 60, 61 |
| 2614 | 75 |
| 2615 | 76 |
| 2618 | 27 |
| 2620 | 27 |
| 2622 | 27, 34 |
| 2646 | 159 |
| 2647 | 159 |
| 2648 | 159, 186 |
| 2653*a* | 66, 67, 136, 137, 160, 355 |
| 2666 | 136 |
| 2667 | 136 |
| 2694 | 163 |
| 2718 | 349, 352 |
| 2730 | 80, 241 |
| 2732, subd. 7 | 250 |
| 2743 | 361 |
| 2749 | 318 |
| 2752, subd. 4 | 302 |
| 2756 | 319 |
| 2757, subd. 1 | 319 |
| 2759 | 302, 305, 316 |
| 2759, subd. 5 | 303 |
| 2812 | 361, 362 |
| 2827 | 42 |
| 2830 | 42 |
| 2852 | 42 |
| 2990 | 193 |
| 3046 | 259 |
| 3053 | 343 |
| 3057 | 259 |
| 3160 | 395 |
| 3169, subd. 3 | 253 |
| 3170 | 396 |
| 3172 | 396 |
| 3191, subd. 3 | 36 |
| 3213 | 259 |
| 3229 | 346 |
| 3240 | 14 |
| 3253, subd. 1, 2 | 373 |
| 3271 | 25 |
| 3273 | 346 |
| 3297 | 101 |
| 3344 | 394 |
| 3347, subd. 6 | 259 |
| 3347, subd. 7 | 62 |
| 3372 | 15, 25, 53 |
| 3382 | 234 |

## SECTIONS OF THE CODE OF PROCEDURE CITED.


| Section | Page |
|---|---|
| 121 | 160 |
| 149 | 150 |
| 202 | 392 |
| 300 | 394 |
| 317 | 359 |


## SECTIONS OF THE PENAL CODE CITED.


| | |
|---|---|
| 107 | 391 |
| 109 | 391 |


## SESSION LAWS CITED.


| | | | |
|---|---|---|---|
| Laws of | 1786, | chap. 27 | 430 |
| " | 1823, | " 70 | 134 |
| " | 1837, | " 460, § 20 | 27 |
| " | 1847, | " 280, § 12 | 136 |
| " | 1853, | " 238 | 130 |
| " | 1859, | " 360 | 184 |
| " | 1862, | " 484, § 16 | 258 |
| " | 1863, | " 362 | 80 |
| " | 1864, | " 422 | 69 |
| " | 1872, | " 629 | 392, 396 |
| " | 1874, | " 545, § 7 | 392 |
| " | 1875, | " 479 | 396 |
| " | 1879, | page 607 | 166 |
| " | 1880, | chap. 245, § 1 | 101 |
| " | 1880, | " 245, § 1, subd. 50 | 393 |
| " | 1880, | " 245, § 3, subd. 8 | 354 |
| " | 1882, | " 410 | 259 |
| " | 1885, | " 342, § 8 | 63, 238, 239 |
| " | 1885, | " 342, § 24, subd. 6 | 262 |
| " | 1887, | " 703, § 10 | 74 |
| " | 1889, | " 504 | 299 |
| " | 1890, | " 523 | 236, 237 |
| " | 1892, | " 418 | 236, 237 |
| " | 1892, | " 481 | 15 |
| " | 1892, | " 591 | 215 |
| " | 1892, | " 689, § 115 | 291 |
| " | 1892, | " 690, § 43 | 124 |

Page
Laws of 1893, chap. 175 ..... 43
" 1893, " 686 ..... 352
" 1894, " 688 ..... 61
" 1894, " 750 ..... 258
" 1895, " 241 ..... 101
" 1896, " 277 ..... 375

## NEW YORK REVISED STATUTES CITED.

1 R. L. 1801, 178, 317, 325 ..... 133
1 R. L. 1813, 364, 444, 454 ..... 133
2 R. S. 57, § 7 ..... 135
2 R. L. 60, § 23 ..... 135
2 R. S. 66, § 55, 57, 58 ..... 135
2 R. S. 67, § 59 ..... 135
2 R. S. 93, § 58 ..... 80
2 R. S. 458, § 3 ..... 69
2 R. S. 573 ..... 226
2 R. S. 609, § 97, 100 ..... 135
3 Edmonds' Statutes, 735 ..... 311

## UNITED STATES REVISED STATUTES CITED.

Section
4 ..... 269
747 ..... 269
914 ..... 309

## ENGLISH STATUTES CITED.

20 and 21 Vict. chap. 77 ..... 133
Pickering's Statutes at Large, 420–437 ..... 133

## APPELLATE DIVISION RULES CITED.

Rule 1 ..... 208
" 5 ..... 208

## GENERAL RULES OF PRACTICE CITED.

Page
Rule 31 ..... 354, 378

## CONSTITUTION OF THE STATE OF NEW YORK CITED.

Constitution of 1846 ..... 185

## STATUTORY CONSTRUCTION LAW CITED.

Section 32 ..... 352

## TEXT BOOKS, ETC., CITED.

2 Abbott's N. Y. Digest, 770 ..... 94
13 Am. and Eng. Ency. of Law, 726, 733, 734 ..... 315
18 Am. and Eng. Ency. of Law, 767 ..... 37
21 Am. and Eng. Ency. of Law, 994 ..... 204
American Law Dictionary ..... 158
Baylies on New Trials, 18,19 ..... 147
Baylies on Code Pleading, 235 ..... 153
2 Bishop on Mar. and Div. § 459, 460 ..... 40
Bishop on Written Law, § 82, 93 ..... 119
Bliss on Code Pleading, § 396 ..... 144, 153
3 Blackstone's Coms. 430 ..... 318
Century Dictionary "Poor" ..... 37
Crocker on Sheriffs (3d. ed.) 642 ..... 157
2 Daniell's Chy. Practice (4th ed.) 1621 ..... 94
Drake on Attachment, § 102 ..... 204
Endlich on Statutes, § 490, 492 ..... 352
Hilliard on New Trials (2d ed.) 590 ..... 94
Hurd on Habeas Corpus, 553 ..... 226
1 Kent's Coms. 455 ..... 106
2 Kent's Coms. 77 ..... 41
Pomeroy on Remedial Rights, § 415, 422 ..... 125
3 Pomeroy's Eq. Jurisp. (13th ed.) 1323 ..... 292
Potter's Dwarris on Statutes, 226 ..... 344
Redfield's Surrogates (5th ed.) 438 ..... 83
Rogers on Expert Testimony, 486 ..... 38
Story's Eq. Pleading (10th ed.) § 291 ..... 292

Page.
2 Story's Eq. Jurisp. (13th ed.) § 821.....292
Thompson on Trials, § 2186.....112
2 Wait's Practice, 443, 444.....144

---

## SECTIONS OF THE CODE OF CIVIL PROCEDURE.

CONSTRUED OR CITED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: New York Reports, Vols. 145 to 148 inc.; Hun's Reports, Vols. 83 to 92 inc.; Appellate Division Reports, Vols. 1, 2, 3; Miscellaneous Reports, Vols. 11 to 15 inc.; N. Y. Civil Procedure Reports, Vol. 25, and New York Monthly Law Record, Vol. 1, pages 1 to 120 inc.

Chap. 4, Tit. 2. Geibel *v.* Elwell.....91 Hun, 550.
Chap. 7, Tit. 3, Art. 2 Harding *v.* Elliott..91 Hun, 502.
Part 2, Chap. 14, Tit. 1, Art. 9 Howe's Cave Lime Co. *v.* Howe's Cave Ass'n.....88 Hun, 554.
Chap. 18, Tit. 3, Art. 2 Snow *v.* Hamilton..90 Hun, 157.
Chap. 23 City of Syracuse *v.* Stacy.....86 Hun, 441.
Chap. 23, Tit. 1 Matter of Thompson.....86 Hun, 405.
§ 8 People *ex rel.* Barnes *v.* Court of Sessions.....147 N. Y. 290.
11 People *ex rel.* Barnes *v.* Court of Sessions.....147 N. Y. 290.
14 Fromme *v.* Grey.....148 N. Y. 695.
14 Fromme *v.* Grey.....25 N. Y. Civ. Pro. 116, 273.
14 People *ex rel.* Pond *v.* Tamsen.....25 N. Y. Civ. Pro. 141.
19 Ellensohn *v.* Keyes.....25 N. Y. Civ. Pro. 352.
66 Keane *v.* Keane.....86 Hun, 159.
66 Bevens *v.* Albro.....86 Hun, 590.
66 Longyear *v.* Carter.....88 Hun, 513.
66 Willis *v.* Pentelow.....92 Hun, 284.
66 Drago *v.* Smith.....92 Hun, 536.
66 Publisher's Printing Co. *v.* Gillen Printing Co.....25 N. Y. Civ. Pro. 320.
94 People *ex rel.* Criscolla *v.* Adams.....89 Hun, 284.
111 Sandman *v.* Seaman.....84 Hun, 337.
190 *In re* Harriot.....145 N. Y. 540.
232 People *v.* Shea.....147 N. Y. 78.

284 People *v.* Shea.....147 N. Y. 78.
369 Archibald *v.* N. Y. Central & H. R. R. R. Co.....1 App. Div. 251.
379 Finn *v.* Lally.....1 App. Div. 411.
382 *In re* Clark *v.* Water Com'rs of Amsterdam.....148 N. Y. 1.
382 Matter of Miller.....15 Misc. 556.
382, subd. 5 Higgins *v.* Crouse.....147 N. Y. 411.
382, subd. 5 Exkorn *v.* Exkorn.....1 App. Div. 124.
383 Blake *v.* Clausen.....25 N. Y. Civ. Pro. 310.
384 Salisbury *v.* Bennett.....25 N. Y. Civ. Pro. 306.
392 Lynch *v.* Lynch.....89 Hun, 112.
396 Jagare *v.* Goetz.....11 Misc. 380.
396 Giebel *v.* Elwell.....91 Hun, 550.
401 Hart *v.* Kip.....25 N. Y. Civ. Pro. 205.
401 Hart *v.* Kip.....148 N. Y. 306.
401 Salisbury *v.* Bennett.....25 N. Y. Civ. Pro. 306.
401 Palmer *v.* Bennett.....83 Hun, 220.
410 Dolan *v.* Davidson.....25 N. Y. Civ. Pro. 403.
415 Blake *v.* Clausen.....25 N. Y. Civ. Pro. 310.
417 George *v.* Fitzpatrick.....25 N. Y. Civ. Pro. 383.
418 George *v.* Fitzpatrick.....25 N. Y. Civ. Pro. 383.
432 Killey *v.* Central Complete Combustion Mfg. Co.....25 N. Y. Civ. Pro. 48.
432 Stanton *v.* U. S. Pipe Line Co.....25 N. Y. Civ. Pro. 180.
432 Coler *v.* Pittsburgh Bridge Co..... 146 N. Y. 281.
432 Coler *v.* Pittsburgh Bridge Co.....84 Hun, 285.
432, subds. 1 and 2 Silver *v.* West Assurance Co.....3 App. Div. 572.
432, subd. 3 Palmer *v.* Chicago Eve. Post Co.....85 Hun, 403.
432, subd. 3 Howard *v.* Presidential Ins. Co.1 App. Div. 135.
432, subd. 3 Silver *v.* West. Assurance Co..3 App. Div. 572.
435–445 Sabin *v.* Kendrick.....25 N. Y. Civ. Pro. 280.
438 Foster *v.* Electric Heat Regulator Co..25 N. Y. Civ. Pro. 223.
438, subd. 6 Davis *v.* Fox.....1 App. Div. 403.
439 Orr *v.* Currie.....25 N. Y. Civ. Pro. 16.
439 Foster *v.* Electric Heat Regulator.....25 N. Y. Civ. Pro. 223.
446 Trueb *v.* N. Y. Asbestos M'f'g Co.....25 N. Y. Civ. Pro. 347.
447 Hilton Bridge Co. *v.* Gouverneur R. R. Co.....90 Hun, 584.
451 Von Hatten *v.* Scholl.....25 N. Y. Civ. Pro. 247.
452 Griswold *v.* Caldwell.....25 N. Y. Civ. Pro. 122.
452 Merchants' Nat. Bk. *v.* Hagemeyer....25 N. Y. Civ. Pro. 332.
452 Griswold *v.* Caldwell.....14 Misc. 299.
452 Du Bois *v.* Union Dime Savings Ins...25 N. Y. Civ. Pro. 288.
452 Du Bois *v.* Union Dime Savings Ins...89 Hun, 382.

452 Graves v. Masonic Temple Ass'n.....85 Hun, 496.
452 Matter of Fontana.....85 Hun, 219.
453 Griswold v. Caldwell.....25 N. Y. Civ. Pro. 122.
453 Griswold v. Caldwell.....14 Misc. 421.
454 Isear v. McMahon.....25 N. Y. Civ. Pro. 217.
458 McNamara v. Nolan.....25 N. Y. Civ. Pro. 35.
458 Wihuyk v. 2d Ave. R. R. Co.....1 N. Y. Law Record, 107.
460 Helmprecht v. Bown.....87 Hun, 362.....
467 McNamara v. Nolan.....25 N. Y. Civ. Pro. 35.
467 Wihuyk v. 2d Ave. R. R. Co.....1 N. Y. Law Record, 107.
478–546 Deeves v. Met. Realty Co. of N. Y..25 N. Y. Civ. Pro. 276.
483 Overbagh v. Oathout.....90 Hun, 506.
488 Am. Lucol Co. v. Broadwell.....1 N. Y. Law Record, 69.
488 Trueb v. N. Y. Asbestos M'f'g Co.....25 N. Y. Civ. Pro. 347.
490 Isear v. McMahon.....25 N. Y. Civ. Pro. 217.
495 Wintringham v. Whitney.....1 App. Div. 219.
501 Fleming v. Humber & Co.....1 N. Y. Law Record, 109.
501 McQueen v. New.....86 Hun, 271.
502 Gallagher v. Stevenson Brewing Co...25 N. Y. Civ. Pro. 106.
502 Davis v. Knipp.....92 Hun, 297.
508 Cochrane v. Bennett..... ...1 N. Y. Law Record, 114.
521 West End Co-op. B. & L. Ass'n v. Schram.....1 N. Y. Law Record, 117.
521 McGuckin v. Milbank .....83 Hun, 473.
521 N. Y. Life Ins. & Trust Co. v. Cuthburt..... .....87 Hun, 339.
522 Gilbert v. McKenna.....25 N. Y. Civ. Pro. 143.
522 Cochran v. Beich.....25 N. Y. Civ. Pro. 147.
531 Spies v. Michelsen.....25 N. Y. Civ. Pro. 188.
532 Ringle v. Wallis Iron Works.....25 N. Y. Civ. Pro. 261.
532 Ringle v. Wallis Iron Works.....1 N. Y. Law Record, 72.
534 Fleming v. Humber & Co..... ....1 N. Y. Law Record, 109.
534 Oisher v. Craven..... ... .....11 Misc. 139.
538 Baum's Castorine Co. v. Thomas.....92 Hun, 1.
542 Remsen v. Hoyt.....1 N. Y. Law Record, 46.
544 O'Sullivan v. N. Y. El. R. R. Co.....25 N. Y. Civ. Pro. 163.
546 Trueb v. N. Y. Asbestos M'f'g Co.....25 N. Y. Civ. Pro. 347.
549 Vidal v. Reilly.....1 N. Y. Law Record, 36.
549 Lamkin v. Oppenheim.....86 Hun, 27.
549, subd. 4 Clinton Bank v. Colliquon....83 Hun, 467.
549, subd. 4 Bussey & McLeod Stone Co. v. Wilkins.....1 App. Div. 154.
549, subd. 4 Engelhardt Co. v. Benjamin..2 App. Div. 91.
567 Levy v. Bernhard..... .....2 App. Div. 336.
568 Levy v. Bernhard.....2 App. Div. 336.
572 Hedges v. Payne.....85 Hun, 377.
572 Perry v. Kent.....88 Hun, 497.

578 Hamilton *v.* Gorman.....25 N. Y. Civ. Pro. 70.
587 Hamilton *v.* Gorman.....25 N. Y. Civ. Pro. 70.
591 Hedges *v.* Payne .....85 Hun, 377.
595 Hamilton *v.* Gorman.....25 N. Y. Civ. Pro. 70.
596 Hamilton *v.* Gorman.....25 N. Y. Civ. Pro. 70.
635 Rouge *v.* Rouge.....25 N. Y. Civ. Pro. 102.
635 Salisbury *v.* Bennett.....25 N. Y. Civ. Pro. 306.
635 Camp *v.* Searle.....147 N. Y. 150.
635 Shanks *v.* Magnolia Metal Co.....89 Hun, 486.
635 Davis *v.* Fox.....1 App. Div. 403.
635, subd. 3 Rouge *v.* Rouge.....14 Misc. 421.
635, subd. 3 Rouge *v.* Rouge.....15 Misc. 86.
636 Kieley *v.* Central Complete Combustion M'f'g Co.....25 N. Y. Civ. Pro. 48.
636 Sturz *v.* Fischer..... 25 N. Y. Civ. Pro. 202.
636 Sturz *v.* Fischer..... .....15 Misc. 410.
636 Empire Warehouse Co. *v.* Mallett.....84 Hun, 561.
636 Shanks *v.* Magnolia Metal Co.....89 Hun, 486.
636 Newkirk *v.* Hooker.....12 Misc. 198.
636, subd. 2 Casola *v.* Vasquez.....147 N. Y. 258.
638 Kieley *v.* Central, etc., M'f'g Co.....25 N. Y. Civ. Pro. 48.
638 Kieley *v.* Central, etc., M'f'g Co.....147 N. Y. 620.
638 Sabin *v.* Kendrick.....25 N. Y. Civ. Pro. 280.
638 Ladenburg *v.* Commercial Bank.....2 App. Div. 477.
641 Stone *v.* Pratt.....25 N. Y. Civ. Pro. 176.
641 Stone *v.* Pratt.....90 Hun, 39.
641 Sturz *v.* Fischer.....25 N. Y. Civ. Pro. 202.
641 Sturz *v.* Fischer..... 1 N. Y. Law Record, 5.
641 Sturz *v.* Fischer..... .....15 Misc. 410.
644 Gillig *v.* Treadwell Co.....25 N. Y. Civ. Pro. 197.
644 Gillig *v.* Treadwell Co.....148 N. Y. 177.
649 Courtney *v.* 8th Ward Bank of B'klyn..25 N. Y. Civ. Pro. 156.
649 Harding & Tamsen *v.* Elliott.....25 N. Y. Civ. Pro. 294.
649 Isaacs *v.* Deeves.....1 N. Y. Law Record, 98.
649 Harding *v.* Elliott.....91 Hun, 502.
649, subd. 3 Harding *v.* Elliott.....12 Misc. 521.
650 Courtney *v.* 8th Ward Bank of B'klyn..25 N. Y. Civ. Pro. 156.
655 Harding *v.* Elliott.....91 Hun, 502.
655 Harding & Tamsen *v.* Elliott.....25 N. Y. Civ. Pro. 294.
655 Whitney *v.* Davis.....148 N. Y. 256.
655, subd. 2 Whitney *v.* Davis.....88 Hun, 168.
682 Salzbacher *v.* Cawthra & Co.....14 Misc. 545.
683 Sturz *v.* Fischer.....1 N. Y. Law Record, 8.
683 Sturz *v.* Fischer.....25 N. Y. Civ. Pro. 202.
683 Salzbacher *v.* Cawthra & Co.....14 Misc. 545.
697 Gillig *v.* Treadwell Co.....25 N. Y. Civ. Pro. 197.
697 Gillig *v.* Treadwell Co.....148 N. Y. 177.

697 Niagara Grape Market Co. *v.* Wygant..1 App. Div. 588.
709 Lawlor *v.* Magnolia Metal Co.....25 N. Y. Civ. Pro. 235.
709 Lawlor *v.* Magnolia Metal Co.....2 App. Div. 552.
713 Johnson *v.* Cochran.....25 N. Y. Civ. Pro. 215.
713 Johnson *v.* Cochran.....91 Hun, 163.
723 Stone *v.* Pratt.....25 N. Y. Civ. Pro. 176.
723 Stone *v.* Pratt.....90 Hun, 39.
723 Rowell *v.* Lambert.....1 N. Y. Law Record, 31.
723 Rowell *v.* Tuck.....1 N. Y. Law Record, 31.
723 Rowell *v.* Winston.....1 N. Y. Law Record, 31.
723 Heath *v.* N. Y. Building Loan Bank Co.....146 N. Y. 260.
723 Goddard *v.* Cassell.....84 Hun, 43.
723 Schmitt *v.* Nat. Life Ass'n.....84 Hun, 128.
723 Babcock *v.* Kuntzsch.....85 Hun, 33.
723 Lee *v.* Lee.....85 Hun, 588.
723 Alden *v.* Clark.....86 Hun, 357.
723 Schoonmaker *v.* Blass.....88 Hun, 179.
723 Dean *v.* Gilbert.....92 Hun, 427.
723 Van Allen *v.* Gordon.....92 Hun, 500.
723 Proweeder *v.* Lewis.....11 Misc. 109.
724 Feist *v.* 3d Ave. R. R. Co.....25 N. Y. Civ. Pro. 257.
724 Feist *v.* 3d Ave. R. R. Co.....13 Misc. 240.
724 Heath *v.* N. Y. Building Loan Co....91 Hun, 170.
728 Lamkin *v.* Oppenheim.....86 Hun, 27.
731 Wright *v.* Robinson & Co.....84 Hun, 172.
732 Wright *v.* Robinson & Co.....84 Hun, 172.
738 Kiernan *v.* Agricultural Ins. Co.....3 App. Div. 26.
755–760 Griswold *v.* Caldwell & Bien.....25 N. Y. Civ. Pro. 122.
757 Hamilton *v.* Gorman.....25 N. Y. Civ. Pro. 70.
757 O'Sullivan *v.* N. Y. El. R. R. Co.....25 N. Y. Civ. Pro. 163.
767 People *v.* McLaughlin.....2 App. Div. 408.
768 People *v.* McLaughlin.....2 App. Div. 408.
772 Byrnes *v.* Ladew.....25 N. Y. Civ. Pro 194.
772 Byrnes *v.* Ladew.....1 N. Y. Law Record, 10.
775 Condon *v.* Church of St. Augustine..14 Misc. 181.
791 Gouglemann *v.* Wehle.....1 N. Y. Law Record, 42.
791 Simpson *v.* Mayor.....1 N. Y. Law Record, 98.
793 Gouglemann *v.* Wehle.....1 N. Y. Law Record, 42.
793 Simpson *v.* Mayor.....1 N. Y. Law Record, 98.
793 Horn *v.* Belanger.....1 N. Y. Law Record, 107.
793 Zeigler *v.* Trenkman.....1 N. Y. Law Record, 108.
794 Story *v.* Livingston.....1 N. Y. Law Record, 44.
799 Matter of Wendler Mach. Co.....2 App. Div. 16.
808 Hayden *v.* Van Cortlandt.....84 Hun, 150.
808 Drake *v.* Weinman & Co.....12 Misc. 65.
809 Drake *v.* Weinman & Co.....12 Misc. 65.

811 Tobey *v.* McDermott.....1 N. Y. Law Record, 52.
811 Ellensohn *v.* Haselbach.....25 N. Y. Civ. Pro. 345.
814 Ringle *v.* Wallis Iron Works.....25 N. Y. Civ. Pro. 261.
814 Ringle *v.* Wallis Iron Works.....1 N. Y. Law Record, 72.
820 Du Bois *v.* Union Dime Savings Ins..25 N. Y. Civ. Pro. 288.
820 Du Bois *v.* Union Dime Savings Ins..89 Hun, 382.
820 Wenstrom Electric Co. *v.* Bloomer...85 Hun, 389.
827 Matter of Gillespie & Mulholland.....12 Misc. 40.
829 Hirsh *v.* Aner.....146 N. Y. 18.
829 Bump *v.* Pratt.....84 Hun, 201.
829 Cross *v.* Smith,.....85 Hun, 49.
829 Ellis *v.* Flion.....85 Hun, 485.
829 Davis *v.* Davis.....86 Hun, 400.
829 Ketchum *v.* Holden.....88 Hun, 482.
829 Ditmars *v.* Sackett.....92 Hun, 361.
829 Taylor *v.* Welsh.....92 Hun, 272.
829 Humphrey *v.* Sweeting.....92 Hun, 447.
829 Hartigan *v.* Nagle.....11 Misc. 449.
829 Matter of O'Rourke.....12 Misc. 248.
829 Matter of Hartman.....13 Misc. 486.
829 German American Bk. *v.* Slade.....15 Misc. 267.
830 People *ex rel.* Byrne *v.* Brugnau.....3 App. Div. 155.
834 Barker *v.* Cunard Steamship Co.....25 N. Y. Civ. Pro. 108.
834 Morris *v.* N. Y., Ontario & West. R.
R. Co.....25 N. Y. Civ. Pro. 168.
834 Morris *v.* N. Y., Ontario & West. R.
R. Co.....148 N. Y. 88.
834 Van Allen *v.* Gordon.....83 Hun, 379.
834 Dougherty *v.* Met. Life Ins. Co.....87 Hun, 15.
835 People *v.* Buchanan.....145 N. Y. 1.
836 Matter of Murphy.....85 Hun, 575.
843 Foreman *v.* Union & Advertiser Co..83 Hun, 385.
844 Stanton *v.* U. S. Pipe Line Co.....25 N. Y. Civ. Pro. 180.
855 Wallace *v.* Baring.....2 App. Div. 501.
870 *In re* Gains.....25 N. Y. Civ. Pro. 243.
870 Ernst *v.* Met. St. R. R. Co.....1 N. Y. Law Record, 111.
872 *In re* Gains.....25 N. Y. Civ. Pro. 243.
872 Drake *v.* Weinman & Co.....12 Misc. 65.
873 Bowe *v.* Brunnbauer.....25 N. Y. Civ. Pro. 56.
873 Farmers' Natl. Bk. of Annapolis *v.*
Underwood.....25 N. Y. Civ. Pro. 94.
873 Byrnes *v.* Ladew.....25 N. Y. Civ. Pro. 194.
873 Willoughby *v.* Bank of the Met.....1 N. Y. Law Record, 116.
970 Bowen *v.* Sweeney & Gallagher.....25 N. Y. Civ. Pro. 128.
970 Lavelle *v.* Corrignio.....86 Hun, 135.
971 Ellensohn *v.* Keyes.....25 N. Y. Civ. Pro. 353.

974 N. Y. Life Ins. & Trust Co. *v.* Cuthbert Ives *et al*.... .....25 N. Y. Civ. Pro. 377.
977 Van Buren *v.* Lazarus.....1 N. Y. Law Record, 99.
982 Herbert *v.* Griffith.....2 App. Div. 566.
983 Spaulding *v.* Am. Wood-Board Co....25 N. Y. Civ. Pro. 376.
983 Herbert *v.* Griffith.....2 App. Div. 566.
983 Spaulding *v.* Am. Wood-Board Co....25 N. Y. Civ. Pro. 376.
984 Herbert *v.* Griffith.....2 App. Div. 566.
984 Spaulding *v.* Am. Wood-board Co....25 N. Y. Civ. Pro. 376.
986 Spaulding *v.* Am. Wood-Board Co....25 N. Y. Civ. Pro. 376.
987 Herbert *v.* Griffith.....2 App. Div. 566.
993 Matchett *v.* Lindberg.....2 App. Div. 340.
997 Williams *v.* Lindblom.....90 Hun, 370.
999 Miller *v.* Edwards.....1 N. Y. Law Record, 95.
999 Kinsey *v.* Allen.....1 N. Y. Law Record, 102.
1002 Kehrley *v.* Shafer.....92 Hun, 196.
1011 Brown *v.* Root M'f'g Co.....148 N. Y. 294.
1012 Pratt *v.* Pratt..... .....2 App. Div. 534.
1013 Feeter *v.* Arkenburgh.....147 N. Y. 237.
1015 Matter of Gillespie & Mulholland.....12 Misc. 40.
1019 Patterson *v.* Knapp.....83 Hun, 492.
1022 Matter of Baldwin.....25 N. Y. Civ. Pro. 6.
1022 Estate of Havemeyer.....25 N. Y. Civ. Pro. 59.
1022 Harding & Tamsen *v.* Elliott.....25 N. Y. Civ. Pro. 294.
1022 Lazarus *v.* Metropolitan R. Co.....83 Hun, 553.
1022 Walrath *v.* Abbott.....85 Hun, 181.
1022 Finn *v.* Lally.....1 App. Div. 111.
1022 Matchett *v.* Lindberg.....2 App. Div. 340.
1022 Kiernan *v.* Agricultural Ins. Co.....3 App. Div. 26.
1022 Franck *v.* Franck.....11 Misc. 569.
1023 Lazarus *v.* Metropolitan R. Co.....145 N. Y. 581.
1023 Lazarus *v.* Metropolitan R. Co.....83 Hun, 553.
1023 Walrath *v.* Abbott.....85 Hun, 181.
1023 Matchett *v.* Lindberg.....2 App. Div. 340.
1093 Price *v.* Ohio Falls Car Co.....1 N. Y. Law Record, 118.
1187 Davis *v.* Guardian Assurance Co.....87 Hun, 15.
1200 Prentiss *v.* Bowden.....25 N. Y. Civ. Pro. 144.
1205 Hand *v.* Rogers..... ... .....25 N. Y. Civ. Pro. 254.
1207 Brenen *v.* North.....25 N. Y. Civ. Bro. 398.
1209 Petrie *v.* Trustees of Hamilton Coll...92 Hun, 81.
1215 Winterson *v.* Hitchings.....25 N. Y. Civ. Pro. 1.
1217 Davis *v.* Fox .....1 App. Div. 403.
1223 Winterson *v.* Hitchings.....25 N. Y. Civ. Pro. 1.
1228 Matter of Baldwin.....25 N. Y. Civ. Pro. 6.
1229 Colt *v.* Colt.....1 N. Y. Law Record, 68.
1240 Bussey & McLeod Stone Co. *v.* Wilkins.....1 App. Div. 154.

1241 People *ex rel.* Pond *v.* Tamsen.....25 N. Y. Civ. Pro. 141.
1251 Faneuil Hall Nat. Bank *v.* Bussing...147 N. Y. 665.
1260 Mitchell *v.* Piqua Club Ass'n.....25 N. Y. Civ. Pro. 189.
1279 Brenen *v.* North.....25 N. Y. Civ. Pro. 398.
1294 Hersted *v.* Van Ness.....1 App. Div. 120.
1294 People *ex rel.* French *v.* Town.....1 App. Div. 127.
1309 Clason *v.* Kehoe.....87 Hun, 368.
1309 Sterne *v.* Talbott.....89 Hun, 368.
1309 Milligan *v.* Cottle.....92 Hun, 328.
1309 Barber *v.* Rutherford.....12 Misc. 33.
1316 Fox *v.* Matthiessen..... .....84 Hun, 396.
1328 Carlson *v.* Winterson.....146 N. Y. 345.
1328 Carlson *v.* Winterson.....11 Misc. 267.
1328 People *ex rel.* French *v.* Town.....1 App. Div. 127.
1331 N. Y. Security & Trust Co. *v.* Saratoga
Gas, etc., Co.....25 N. Y. Civ. Pro. 385.
1338 Riendeau *v.* Bullock..... .....147 N. Y. 269.
1342 Chesley *v.* Hughes.....83 Hun, 357.
1342 Weaver *v.* Brydges.....85 Hun, 503.
1344 Lynch *v.* Sauer.....25 N. Y. Civ. Pro. 286.
1347 Manhattan R. R. Co. *v.* O'Sullivan....25 N. Y. Civ. Pro. 283.
1347, subd. 4 Francis *v.* Porter.....88 Hun, 325.
1352 Foo Long *v.* American Surety Co....146 N. Y. 251.
1356 Foo Long *v.* American Surety Co....146 N. Y. 251.
1356 *In re* De Long..... .....25 N. Y. Civ. Pro. 363.
1357 *In re* De Long..... .....25 N. Y. Civ. Pro. 363.
1379 Prentiss *v.* Bowden.....145 N. Y. 342.
1391 Field *v.* Ingreham.....15 Misc. 529.
1393 Toole *v.* Supervisors of Oneida Co....25 N. Y. Civ. Pro. 267.
1406 Gillig *v.* Treadwell Co.....25 N. Y. Civ. Pro. 197.
1406 Gillig *v.* Treadwell Co.....148 N. Y. 177.
1406 Niagara Grape Market Co. *v.* Wygant.1 App. Div. 588.
1407 Gillig *v.* Treadwell Co.....25 N. Y. Civ. Pro. 197.
1407 Gillig *v.* Treadwell Co.....148 N. Y. 177.
1421 Corn *v.* Tamsen.....25 N. Y. Civ. Pro. 283.
1421 Hart *v.* Sexton.....11 Misc. 446.
1424 Corn *v.* Tamsen.....25 N. Y. Civ. Pro. 283.
1424 Corn *v.* Tamsen.....1 N. Y. Law Record, 38.
1424 Isaacs *v.* Cohen.....86 Hun, 119.
1426 Isaacs *v.* Cohen.....86 Hun, 119.
1437 Hargin *v.* Wicks.....92 Hun, 155.
1487 Bussey & McLeod Stone Co. *v.* Wil-
kins.....1 App. Div. 154.
1496 Frazier *v.* Dewey.....1 App. Div. 138.
1497 Frazier *v.* Dewey... .....1 App. Div. 138.
1501 Crowley *v.* Murphy.....11 Misc. 579.
1502 Hennessey *v.* Paulsen.....147 N. Y. 255.

1516 Hennessey *v.* Paulsen.....12 Misc. 384.
1525 Gillig *v.* Treadwell Co.....148 N. Y. 177.
1537 Bowen *v.* Sweeney & Gallagher.....25 N. Y. Civ. Pro. 128.
1537 Ellerson *v.* Westcott.....148 N. Y. 149.
1537 Ellerson *v.* Westcott.....88 Hun, 389.
1538 Underhill *v.* Underhill.....25 N. Y. Civ. Pro. 374.
1540 Jackson *v.* Bradhurst.....25 N. Y. Civ. Pro. 228.
1543 Ellerson *v.* Westcott.....88 Hun, 389.
1544 Bowen *v.* Sweeney & Gallagher.....25 N. Y. Civ. Pro. 128.
1569 Wood *v.* Powell.....3 App. Div. 318.
1597 Connolly *v.* Newton.....85 Hun, 552.
1629 Barbig *v.* Kick.....25 N. Y. Civ. Pro. 237.
1630 Barbig *v.* Kick.....25 N. Y. Civ. Pro. 62.
1630 Barbig *v.* Kick.....25 N. Y. Civ. Pro. 237.
1667 Lewis *v.* Thompson.....3 App. Div. 329.
1670 Brenen *v.* North.....25 N. Y. Civ. Pro. 398.
1671 Parker *v.* Selye.....3 App. Div. 149.
1672 Parker *v.* Selye.....3 App. Div. 149.
1674 Lyon *v.* Scott.....1 N. Y. Law Record, 94.
1682 Howes Cave Lime Co. *v.* Howes Cave Ass'n.....88 Hun, 554.
1690 Hoffman *v.* Markham.....88 Hun, 18.
1695 Morton *v.* Chesley.....25 N. Y. Civ. Pro. 230.
1709 Hastings *v.* Nagel.....83 Hun, 205.
1710 Hastings *v.* Nagel.....83 Hun, 205.
1722 Morton *v.* Chesley.....25 N. Y. Civ. Pro. 230.
1726 Morton *v.* Chesley.....25 N. Y. Civ. Pro. 230.
1730 Morton *v.* Chesley.....25 N. Y. Civ. Pro. 230.
1743 Fisk *v.* Fisk.....25 N. Y. Civ. Pro. 38.
1743 Hopper *v.* Hopper.....92 Hun, 415.
1775 Wright & Co. *v.* Philip Hake M'f'g Co.1 N. Y. Law Record, 104.
1776 Kingston Carriage Co. *v.* Hutton.....25 N. Y. Civ. Pro. 68.
1776 Lamson Con. Store Service Co. *v.* Conyngham.....11 Misc. 428.
1780 Barker *v.* Cunard Steamship Co.....25 N. Y. Civ. Pro. 108.
1780 Foster *v.* Electric Heat Regulator Co.25 N. Y. Civ. Pro. 228.
1780 Cremins *v.* East Lake Woolen Co....25 N. Y. Civ. Pro. 365.
1781 People *v.* Powers.....83 Hun, 449.
1781 Pisa *v.* Butler.....90 Hun, 254.
1781 Halpin *v.* Mutual Brewing Co.....91 Hun, 220.
1782 Pisa *v.* Butler.....90 Hun, 254.
1782 Halpin *v.* Mutual Brewing Co.....91 Hun, 220.
1785 State of N. Y. *v.* Equitable Mut. Fire Ins. Co.....25 N. Y. Civ. Pro. 210.
1785 Osborn *v.* Montelac Park.....89 Hun, 167.
1785 People *v.* Equitable Mutual Fire Ins. Co.....12 Misc. 556.

1786 State of N. Y. v. Equitable Mut. Fire Ins. Co. ..... 25 N. Y. Civ. Pro. 210.
1786 Osborn v. Montelac Park ..... 89 Hun, 067.
1786 Snyder v. Lindsey ..... 92 Hun, 482.
1788 State of N. Y. v. Equitable Mut. Fire Ins. Co. ..... 25 N. Y. Civ. Pro. 210.
1788 Meyer v. Lexow ..... 1 App. Div. 116.
1789 Meyer v. Lexow ..... 1 App. Div. 116.
1810 State of N. Y. v. Equitable Mut. Fire Ins. Co. ..... 25 N. Y. Civ. Pro. 210.
1814 Koons v. Wilkin ..... 2 App. Div. 13.
1815 Gibson v. Blakley ..... 85 Hun, 305.
1815 Koons v. Wilkin ..... 2 App. Div. 13.
1819 Matter of Miller ..... 15 Misc. 556.
1822 Titus v. Poole ..... 145 N. Y. 414.
1822 Koons v. Wilkin ..... 2 App. Div. 13.
1835 Ellis v. Filon ..... 85 Hun, 485.
1835 Miles v. Crocker ..... 88 Hun, 312.
1836 Henning v. Miller ..... 83 Hun, 403.
1836 Ellis v. Filon ..... 85 Hun, 485
1836 Miles v. Crocker ..... 88 Hun, 312.
1837 Miller v. Morton ..... 89 Hun, 574.
1844 Cunningham v. Parker ..... 146 N. Y. 29.
1853 Rogers v. Patterson ..... 87 Hun, 219.
1902 Coghlan v. 3d Ave. R. R. ..... 25 N. Y. Civ. Pro. 242.
1903 O'Reilly v. Utah, Nevada & Cal. Stage Co. ..... 87 Hun, 406.
1904 Coghlan v. 3d Ave. R. R. ..... 25 N. Y. Civ. Pro. 242.
1904 O'Reilly v. Utah, Nevada & Cal. Stage Co. ..... 87 Hun, 486.
1906 Brown v. Moore ..... 90 Hun, 169.
1919 Dean v. Gilbert ..... 92 Hun, 427.
1925 Parfitt v. Ferguson ..... 3 App. Div. 176.
1928 Miller v. Bush ..... 87 Hun, 507.
1932 American Surety Co. v. Crow ..... 1 N. Y. Law Record, 62.
2016 Winne v. Houghtaling ..... 84 Hun, 166.
2032 People ex rel. McLaughlin v. Wilson. 88 Hun, 258.
2034 People ex rel. Laird v. Hannah ..... 92 Hun, 476.
2059 Matter of Quinn ..... 25 N. Y. Civ. Pro. 228.
2075 People ex rel. Fiske v. Deverman ..... 83 Hun, 181.
2082 People ex rel. Goring v. Wappinger Falls ..... 91 Hun, 317.
2083 People ex rel. Goring v. Wappinger's Falls ..... 91 Hun, 317.
2086 People ex rel. Keene v. Supervisors .. 83 Hun, 287.
2120, subd. 2 In re Fitch ..... 147 N. Y. 334.
2121 People ex rel. Hanford v. Thayer ..... 88 Hun, 136.

2122 People *ex rel.* Hanford *v.* Thayer.....88 Hun, 136.
2125 Jordan *v.* Board of Education.....25 N. Y. Civ. Pro. 89.
2137 People *ex rel.* D. L. & W. R. R. Co. *v.* County Court.....92 Hun, 13.
2138 People *ex rel.* Philips & Miller *v.* Wurster, Com'r etc.....25 N. Y. Civ. Pro. 367.
2138 People *ex rel.* Dexter *v.* Palmer.....96 Hun, 513.
2140 Jordan *v.* Board of Education.....25 N. Y. Civ. Pro. 89.
2140 People *ex rel.* Burby *v.* Common Council.....85 Hun, 601.
2140 People *ex rel.* Groton Co. *v.* Town Board.....92 Hun, 585.
2141 People *ex rel.* Hanford *v.* Thayer.....88 Hun, 136.
2231 Ward *v.* Burgher.....90 Hun, 540.
2235 Goelet *v.* Roe.....25 N. Y. Civ. Pro. 86.
2244 Gallagher *v.* Stevenson Brewing Co..
2262 Harris *v.* Treu.....25 N. Y. Civ. Pro. 92.
2262 Gould *v.* Simpson.....1 N. Y. Law Record, 66.
2265 Harris *v.* Treu.....25 N. Y. Civ. Pro. 92.
2268 Faxon *v.* Mason.....90 Hun, 426.
2280 People *ex rel.* Pond *v.* Tamsen.....25 N. Y. Civ. Pro. 141.
2284 McAveney *v.* Brush.....1 App. Div. 97.
2285 Fiss *v.* Campbell.....22 N. Y. Civ. Pro. 8.
2286 Foye *v.* Foye.....1 N. Y. Law Record, 6.
2320 Matter of Wing.....83 Hun, 284.
2321 Matter of Wing.....83 Hun, 284.
2323 A *In re* Hopper.....1 N. Y. Law Record, 92.
2325 *In re* Parke.....25 N. Y. Civ. Pro. 196.
2325 *In re* Parke.....1 N. Y. Law Record, 13.
2333 Matter of Lofthouse.....3 App. Div. 139.
2336 Matter of Lofthouse.....3 App. Div. 139.
2339 Matter of Grout.....83 Hun, 25.
2340 People *ex rel.* Canaday *v.* Williams...90 Hun, 501.
2340 Koepke *v.* Bradley.....3 App. Div. 391.
2344 Matter of Grout.....83 Hun, 25.
2384 Union Ins. Co. v. Central Trust Co...87 Hun, 140.
2410 *In re* Seth.....1 N. Y. Law Record, 91.
2421 Matter of Hitchcock, M'f'g Co.....1 App. Div. 164.
2423 Matter of Hamilton Park Co.....1 App. Div. 375.
2427 Matter of Hitchcock M'f'g Co.....1 App. Div. 164.
2428 Matter of Wendler Mach. Co.....2 App. Div. 16.
2429 People *v.* American Steam Boiler Ins. Co.....3 App. Div. 504.
2433, subd. 2 Weaver *v.* Brydges.....85 Hun, 503.
2435 Jennings *v.* Lancaster.....15 Misc. 444.
2442 People *v.* Levy.....25 N. Y. Civ. Pro. 390.

2446 Knights of Pythias *v.* Manhattan Savings Institution.....25 N. Y. Civ. Pro. 44.
2447 Knights of Pythias *v.* Manhattan Savings Institution.....25 N. Y. Civ. Pro. 44.
2447 Krone *v.* Klotz & Beltz.....25 N. Y. Civ. Pro. 330.
2447 Grand Lodge Knights of Pythias *v.* Manhattan Savings Ins.....12 Misc. 626.
2458 People *v.* Cowan.....146 N. Y. 348.
2463 Monolithic Drain Co. *v.* Dewsnap....25 N. Y. Civ. Pro. 380.
2468 Faneuil Hall Nat. Bank *v.* Bussing...147 N. Y. 665.
2472, subd. 3 *In re* Huntley.....25 N. Y. Civ. Pro. 78.
2479 Matter of McGinness.....13 Misc. 714.
2481, subd. 2 Estate of Laytin.....25 N. Y. Civ. Pro. 186.
2514 Estate of Becker.....1 N. Y. Law Record, 21.
2514 Estate of Gurnee.....1 N. Y. Law Record, 83.
2517 *In re* Gregory's Estate.....25 N. Y. Civ. Pro. 71.
2528 *In re* Gregory's Estate.....25 N. Y. Civ. Pro. 71.
2532 *In re* Gregory's Estate.....25 N. Y. Civ. Pro. 71.
2545 *In re* Miner.....146 N. Y. 121.
2546 Estate of Havemeyer.....25 N. Y. Civ. Pro. 59
2546 Matter of Schneider.....1 App. Div. 39.
2559 Matter of Bender.....86 Hun, 570.
2561 Matter of Spooner.....86 Hun, 9.
2562 Matter of Spooner.....86 Hun, 9.
2565 *In re* Harriot.....145 N. Y. 540.
2570 *In re* Harriot.....145 N. Y. 540.
2600 Matter of Horn.....25 N. Y. Civ. Pro. 357.
2601 Matter of Horn.....25 N. Y. Civ. Pro. 357.
2606 Estate of Hartwig.....1 N. Y. Law Record, 21.
2606 Matter of Camp.....91 Hun, 204.
2611 Matter of Gaines.....84 Hun, 520.
2620 *In re* Will of John Oliver.....25 N. Y. Civ. Pro. 25.
2624 Matter of Campbell.....88 Hun, 374.
2642 Harriott *v.* Prime.....87 Hun, 95.
2647 Matter of Ruppaner.....25 N. Y. Civ. Pro. 158.
2648 Matter of Ruppaner.....25 N. Y. Civ. Pro. 158.
2649 Matter of Ruppaner.....25 N. Y. Civ. Pro. 158.
2649 Estate of Laytin.....25 N. Y. Civ. Pro. 186.
2653 A Lewis *v.* Cook.....25 N. Y. Civ. Pro. 65.
2653 A Lewis *v.* Cook.....89 Hun, 183.
2653 A Bowen *v.* Sweeney & Gallagher....25 N. Y. Civ. Pro. 128.
2653 A Matter of Rappaner.....15 Misc. 654.
2653 A Matter of Rappaner.....25 N. Y. Civ. Pro. 158.
2653 A Johnson *v.* Cochran.....25 N. Y. Civ. Pro. 215.
2653 A Johnson *v.* Cochran.....91 Hun, 163.
2653 A Katz *v.* Schmaur.....87 Hun, 343.
2653 A Snow *v.* Hamilton.....90 Hun, 157.

2660 Matter of Wilson.....92 Hun, 318.
2663 Matter of Wilson.....92 Hun, 318.
2664 Lowman *v.* Elmira, Cortland & North R. Co.....85 Hun, 188.
2687, subd. 3 *In re* O'Brien.....145 N. Y. 379.
2691 Estate of Sagnol.....1 N. Y. Law Record, 77.
2693 Matter of Manley.....12 Misc. 472.
2694 Matter of Ruppaner.....25 N. Y. Civ. Pro. 158.
2700 Estate of Frothingham.....1 N. Y. Law Record, 80.
2701 Estate of Larnac.....1 N. Y. Law Record, 19.
2706 Matter of Lynch.....88 Hun, 39.
2711 *In re* Harriot.....145 N. Y. 540.
2712 Estate of Gurnee.....1 N. Y. Law Record, 83.
2714 Matter of Lynch.....88 Hun, 39.
2717 Matter of Woodbury.....13 Misc. 474.
2718 Mulligan *v.* Cannon.....25 N. Y. Civ. Pro. 348.
2718 Henning *v.* Miller.....83 Hun, 403.
2718 Rutherford *v.* Soop.....85 Hun, 119.
2718 Lee *v.* Lee.....85 Hun, 588.
2718 Ellis *v.* Filon.....85 Hun, 485.
2718 Mills *v.* Crocker.....88 Hun, 312.
2718 Whitcomb *v.* Whitcomb.....92 Hun, 443.
2719 Matter of Wing.....83 Hun, 284.
2719, subd. 3 Matter of Townsend.....83 Hun, 200.
2722 Estate of Gibbins.....1 N. Y. Law Record, 82.
2722 Matter of Corbett.....90 Hun, 182.
2723 Matter of Hammond.....92 Hun, 478.
2723 Matter of Sheffield.....1 N. Y. Law Record, 20.
2725 Estate of Gibbins.....1 N. Y. Law Record, 82.
2726 Estate of Gibbins.....1 N. Y. Law Record, 82.
2726, subd. 4 Baldwin *v.* Smith.....3 App. Div. 350.
2727 Estate of Becker.....1 N. Y. Law Record, 21.
2727 Estate of Sagnol.....1 N. Y. Law Record, 77.
2727 Estate of Gibbins.....1 N. Y. Law Record, 82.
2727 Matter of Flint.....15 Misc. 598.
2728 Baldwin *v.* Smith.....3 App. Div. 350.
2730 *In re* Huntley.....25 N. Y. Civ. Pro. 78.
2730 Estate of Quinn.....25 N. Y. Civ. Pro. 240.
2732 Coghlan *v.* 3d Ave. R. R. Co.....1 N. Y. Law Record, 57.
2743 Koons *v.* Wilkin.....2 App. Div. 13.
2743 Matter of Arkenburgh.....13 Misc. 744.
2743 Matter of Horn.....25 N. Y. Civ. Pro. 357.
2746 Matter of Sheffield.....1 N. Y. Law Record, 20.
2746 Lowman *v.* Elmira, Cortland & North R. Co.....85 Hun, 188.
2752 Estate of Lichtenstein.....25 N. Y. Civ. Pro. 301.
2756 *In re* Stowell's Estate.....25 N. Y. Civ. Pro. 316.

2759 Estate of Lichtenstein.....25 N. Y. Civ. Pro. 301.
2805 Farrelly v. Hubbard.....148 N. Y. 592.
2817 Matter of Havemeyer.....3 App. Div. 519.
2822 Matter of Horn.....25 N. Y. Civ. Pro. 357.
2827 Matter of Jerome & Leonie Alexandre, Infants.....25 N. Y. Civ. Pro. 42.
2830 Matter of Jerome & Leonie Alexandre, Infants.....25 N. Y. Civ. Pro. 42.
2840 Matter of Department of Public Parks.89 Hun, 529.
2852 Matter of Jerome & Leonie Alexandre, Infants.....25 N. Y. Civ. Pro. 42.
2868 Harley v. Fitzgerald.....84 Hun, 305.
2886 Beardsley v. Pope.....88 Hun, 560.
2890 Beardsley v. Pope.....88 Hun, 560.
2891 Harley v. Fitzgerald.....84 Hun, 305.
2895, subd. 3 Farrelly v. Hubbard.....84 Hun, 391.
2944 Crisp v. Rice.....83 Hun, 465.
2947 Davis v. Aikin.....85 Hun, 554.
2990 Sherman v. Green.....25 N. Y. Civ. Pro. 191.
2990 Sherman v. Green..... 90 Hun, 462.
3015 Beardsley v. Pope.....88 Hun, 560.
3015 Catlin v. Rundell.....1 App. Div. 157.
3015 Sweet v. Marvin.....2 App. Div. 1.
3015 Tousley v. Morners.....14 Misc. 125.
3025 Winne v. Houghtaling.....84 Hun, 166.
3026 Farrelly v. Hubbard.....148 N. Y. 592.
3039 Rutzkowski v. George.....92 Hun, 412.
3049 Black v. Maitland.....1 App. Div. 6.
3051 Colligan v. Workingman's Co-op. Ass'n, etc.....1 N. Y. Law Record, 33.
3053 Lazarus v. Ludwig.....25 N. Y. Civ. Pro. 348.
3063 Rutzkowski v. George.....92 Hun, 412.
3064 Debevoise v. Ingalls.....88 Hun, 136.
3068 Bann's Castorine Co. v. Thomas.....92 Hun, 1.
3070 Pierano v. Merritt.....148 N. Y. 289.
3070 Pierano v. Merritt.....89 Hun, 207.
3070 Rhodes v. Carr.....88 Hun, 219.
3071 Rhodes v. Carr.....88 Hun, 219.
3072 Rhodes v. Carr.....88 Hun, 219.
3073 Shaver v. Eldred.....86 Hun, 51.
3129 Kenney v. Livery-Stable Keepers' Ass'n.....89 Hun, 190.
3160 People v. Levy.....25 N. Y. Civ. Pro. 390.
3169 Newkirk v. Hooker.....12 Misc. 198.
3169, subd. 3 Niagara Falls Paper Co. v. Sterling.....25 N. Y. Civ. Pro. 251.
3191 McNamara v. Nolan.....25 N. Y. Civ. Pro. 35.

3220 *In re* Sherwood.....1 N. Y. Law Record, 90.
3228 Wihnyk *v.* 2d Ave. R. R. Co.....1 N. Y. Law Record, 107.
3228 People *ex rel.* Keene *v.* Supervisors..83 Hun, 237.
3239 People *ex rel.* Bleecker St. R. R. Co.
*v.* Barker.....90 Hun, 253.
3240 City of Brooklyn *v.* Long Island Water
Supply Co.....25 N. Y. Civ. Pro. 14.
3240 *In re* City of Brooklyn.....148 N. Y. 107.
3243, subd. 9 Davis *v.* Fox.....1 App. Div. 403.
3246 Mullen *v.* Guinn.....88 Hun, 128.
3247 Peetch *v.* Quinn.....12 Misc. 61.
3251 Voght M'f'g & Coach Lace Co. *v.* Olt-
tinger.....88 Hun, 52.
3251 Davis *v.* Grand Rapids Fire Ins. Co...15 Misc. 78.
3251, subd. 3 Perkins *v.* Brainard Quarry
Co.....11 Misc. 337.
3251, subd. 5 Shaver *v.* Eldred.....86 Hun, 51.
3253 Barnes *v.* Meyer.....1 N. Y. Law Record, 113
3253 Meyer Rubber Co. *v.* Lester Shoe Co.86 Hun, 473.
3253 Godley *v.* Kerr Salt Co.....3 App. Div. 17.
3253 Roberts *v.* N. Y. El. R. R. Co.....12 Misc. 345.
3253 Barnes *v.* Meyer.....25 N. Y. Civ. Pro. 372.
3254 Perkins *v.* Heert.....14 Misc. 425.
3256 Shaver *v.* Eldred.....86 Hun, 51.
3258 Shaver *v.* Eldred.....86 Hun, 51.
3258 Isaacs *v.* Cohen.....86 Hun, 119.
3267 Dempsey *v.* Baldwin.....1 N. Y. Law Record, 103.
3271 Ridgway *v.* Symons.....25 N. Y. Civ. Pro. 23.
3272 Ridgway *v.* Symons.....25 N. Y. Civ. Pro. 23.
3272 Schwartz *v.* Scott.....25 N. Y. Civ. Pro. 53.
3273 Ellensohn *v.* Haselbach.....25 N. Y. Civ. Pro 345.
3297 Hosmer *v.* Gans.....25 N. Y. Civ. Pro. 100.
3297 Hosmer *v.* Gans.....14 Misc. 229.
3333 Losey *v.* Stanley.....83 Hun, 420.
3318 Matter of Bender.....86 Hun, 570.
3328 Belappi *v.* Hovey.....90 Hun, 135.
3333 People *v.* McLaughlin.....2 App. Div. 408.
3334 People *v.* McLaughlin.....2 App. Div. 408.
3347, subd. 6 Feist *v.* 3d Ave. R. R. Co....25 N. Y. Civ. Pro. 257.
3357 Manhattan R. R. Co. *v.* Klipstein....84 Hun, 579.
3357 City of Syracuse *v.* Benedict.....86 Hun, 343.
3360 Erie & Central N. Y. R. Co. *v.* Welch.1 App. Div. 140.
3365 City of Syracuse *v.* Benedict.....86 Hun, 343.
3372 City of Brooklyn *v.* Long Island Water
Supply Co.....25 N. Y. Civ. Pro. 14.
3372 *In re* City of Brooklyn.....148 N. Y. 107.

3372 Hornellsville R. Co. *v.* N. Y., Lake Erie & West. R. Co.....88 Hun, 407.
3372 Matter of City of Brooklyn .....88 Hun, 176.
3372 Manhattan R. Co. *v.* McKee.....1 App. Div. 498.
3382 Manhattan R. R. Co. *v.* O'Sullivan...25 N. Y. Civ. Pro. 282.
3385 Manhattan R. R. Co. *v.* Klipstein....84 Hun, 579.

# CIVIL PROCEDURE REPORTS.

---

## MARIA L. WINTERSON *v.* HECTOR M. HITCHINGS, *et al.*

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, JUNE, 1895.

§§ 1215, 1223.

*Action for restitution—plaintiff must pay judgment.*

In an action for restitution and to restrain the sheriff from executing a deed of property under a sale already made by him, and to vacate and cancel such sale and the certificate thereof, the proposed order must contain a provision that, as a condition of granting the relief sought, the plaintiff must pay to the defendant the amount of the judgment due him, even though such judgment be not the original judgment under which the property was sold, but was obtained on a new trial of the issues.

By his default the defendant admits only the facts properly pleaded, not that the plaintiff is entitled to the relief demanded or the extent of that relief. It is for the court to determine upon the facts, to what relief the plaintiff is entitled.

Where the parties have submitted themselves to the equitable jurisdiction of the court, the court has the power to grant such a judgment as will fully dispose of all the issues between them involved in the matter submitted.

(*Decided June*, 1895.)

Appeal by the defendant Hitchings from a judgment entered in favor of the plaintiff by order of the judge at Special Term.

This action was in effect for restitution and to restrain the sheriff from executing a deed under a sale

already made by him, and to vacate and cancel such sale and the certificate thereof.

The sale was made in execution of a judgment subsequently reversed. Upon the new trial the plaintiff again recovered and this action for restitution was then begun. The judgment rendered upon the verdict in the second trial has since been affirmed both by the City Court and by this court.

The complaint in the present action was demurred to by the defendant upon the ground that it contained no offer to pay the second judgment recovered and held by the defendant against the plaintiff, but the court at Special Term overruled the demurrer with leave to answer upon payment of costs, which judgment the General Term affirmed with costs.

Instead of paying costs and answering, the defendant allowed the time for answering to pass, in reliance, as he claims, upon the fact that all allegations necessary to properly present the question to a court of equity, were contained in the complaint and upon certain passages of the opinions written at Special Term and at General Term upon the decision of the demurrer, intimating that the relief sought in the complaint would only be granted upon satisfaction of the second judgment.

As the plaintiff did not move for final judgment, the defendant at last made such a motion upon an affidavit which recounted the history of the matter and contained an expression of willingness to pay the costs awarded upon the decisions of the demurrer. The proposed judgment was in part as follows: "Now, therefore, it is hereby ordered, adjudged and decreed, that it be, and it is hereby referred to ——— ———, Esq., as Referee, to ascertain and determine the amounts which are due and owing from this plaintiff

to the defendant, Hitchings, as and for any and all judgments now held and owned by him against the plaintiff herein, with interest, and any and all disbursements incurred by him in and about the sale of the plaintiff's property herein, and any and all proper legal charges and liens owned by him against said property, and that upon the payment by the plaintiff herein of the amount so found due by said Referee, together with the costs of the reference, and the prayer of the complaint be, and it is hereby granted, and that the defendant, John B. Sexton, be enjoined and restrained from executing to the defendant Hitchings, any deed under the sale made September 1st, 1892, and that the sheriff's certificate of sale be vacated and cancelled of record, and that the plaintiff recover of the defendant, Hitchings, her said costs and disbursements herein, to wit: the sum of thirty-five and 50-100 dollars, and the sum of sixty-four and 65-100 dollars, amounting in the whole to one hundred and 15-100 dollars.

The motion for the entry of the above judgment was denied and the following upon motion of the plaintiff was ordered instead: "Ordered, that the plaintiff have judgment enjoining and restraining the defendant John B. Sexton as Sheriff, from executing any deed under the sale made Sept. 1st, 1892, and that said sale, and said sheriff's certificate of sale, be vacated and cancelled of record, and that plaintiff recover her costs of this action against the defendant Hitchings."

From the judgment entered in accordance with this order the defendant Hitchings now appeals, "and especially from so much of said judgment as fails and neglects to order and adjudge, as a condition of granting the relief therein provided, that the plaintiff

should pay to this defendant the amount of the several judgments recovered by one Louise Carlson, (the plaintiff in the original action and who assigned the judgment she therein recovered to Hitchings her attorney) as plaintiff, against Maria L. Winterson," etc., and he also appeals from the order denying his motion for the above judgment proposed by him.

*Hector M. Hitchings*, for appellant.

*E. F. Bullard*, for respondent.

GIEGERICH, J.—Section 1223 of the Code of Civil Procedure declares that "Upon an application, by either party, to the court for final judgment, after the decision of an issue at law, as presented in the last two sections, the court has the power specified in section 1215 of this act, upon an application for judgment by the plaintiff," and section 1215 declares: "The court must thereupon render the judgment, to which the plaintiff is entitled. It may, without a jury, or with a jury, if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it to render the judgment, or to carry it into effect; or it may, in its discretion, direct a reference, or a writ of inquiry, for either purpose."

By his default the defendant admits only the facts properly pleaded, not that the plaintiff is entitled to the relief demanded, or the extent of that relief. It is for the court to determine, upon the facts, to what relief the plaintiff is entitled (Argall *v.* Pitt, 78 *N. Y.* 239; Bullard *v.* Sherwood, 85 *id.* 253; Frick *v.* White, 57 *id.* 107; United States Life Ins. Co. *v.* Jordan, 46 *Hun*, 201).

In overruling the demurrer to the complaint in this action the judge at special term (9 *Misc.* 324) said:

"* * * having voluntarily come into equity to apply for relief, the plaintiff in this action will be deemed to have submitted herself to the invocation of the rule that he who seeks equity must do equity. * * * Accordingly, the relief which she seeks to obtain will only be extended to the plaintiff upon satisfaction of the defendant's demand under the second judgment."

And the General Term in affirming that judgment (10 *Misc.* 398) said: "The recovery of a second judgment for the same claim gave him no lien on the property which the judgment debtor must offer to satisfy before claiming restitution. Such subsequent judgment only afforded a ground or claim for equitable consideration when the rights of the parties are submitted to the court for adjudication."

The respondent urges that the appellant ought to have paid the interlocutory costs imposed, upon the decisions of the demurrer by the special and general terms, as a condition upon which an answer might be served. We cannot see that such a course would have materially altered the situation of the parties. An answer would not have presented the issues more fully than they are now presented or in any different form, and the appellant expresses in his affidavit a willingness to pay such costs and in fact introduced in the proposed final judgment submitted by him a provision to that effect.

But aside from this, as the parties have submitted themselves to the equitable jurisdiction of the court, the court has the power to grant such a judgment as will fully dispose of all the issues between them, involved in the matter submitted.

Having reached the conclusion that the judgment entered was erroneous in that it makes no provision for satisfying the defendant's demand under his second

judgment, it follows that the judgment should be reversed and the matter remanded to the Special Term for further action, with costs.

BISCHOFF, JR., P. J., and PRYOR, J., concur.

Judgment reversed and the matter remanded to the Special Term, for further action, with costs.

---

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF ELIZABETH S. BALDWIN, EXECUTRIX OF THE WILL OF GEORGE R. BALDWIN, DECEASED.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT, JUNE, 1895.

§§ 1022, 1228.

*Judgment entered by clerk upon referee's report held void.*

Where the report of a referee to hear and determine finds facts, showing a claim against the defendant as executrix, but, as a conclusion of law that plaintiffs were "entitled to judgment against the defendant," and contained no express direction for the judgment to be entered, as required by section 1022 of the Code of Civil Procedure—*Held*, that there was no sufficient direction within the meaning of such section to authorize the clerk, under section 1228, to enter judgment against the defendant in her fiduciary capacity; that a judgment so entered against her was void, and should have been excluded when offered as the basis of a claim against the estate upon a subsequent accounting before the surrogate.

It is only in respect to irregularities or informalities in the entry of a judgment that it is to be regarded as valid while it stands, but

it has no such binding force when the defect apparent upon the face of the judgment roll shows that the judgment itself is a nullity, because that question can be raised at any time when the judgment is sought to be enforced. Hinds *v.* Kellogg, 87 *St. Rep.* 356, distinguished.

(*Decided June*, 1895.)

Appeal from decree of Surrogate.

*Isaac N. Miller* (of counsel) for appellant.

*George W. Stephens* (of counsel) for respondents.

O'Brien, J.—This proceeding was instituted by respondents, claiming to be judgment creditors of Elizabeth S. Baldwin, as executrix of George R. Baldwin, deceased, to compel her to render an account of her proceedings as such executrix. In the account filed by her she disputed that the respondents had recovered any judgment against her, but by the decree appealed from it was adjudged that they were creditors and entitled to receive from her as executrix the amount of a certain judgment, the validity of which she had assailed. The question presented, therefore, upon this appeal relates to the validity of such judgment, which was received in evidence upon the accounting, and, if admissible, properly sustained the claim of the respondents as judgment creditors.

As to such judgment it appears that in a suit brought by the respondents against Elizabeth S. Baldwin, as executrix, the matter was referred to a referee to hear and determine, and he thereafter filed his report, wherein he found as a conclusion of law, "That the plaintiffs as executors of the last will and testament of Elizabeth Carter, deceased, are entitled to judgment against the defendant Elizabeth S. Baldwin, as of August 6th, 1889, the date of this report, for the sum of $2,186.72, besides the costs of this

action." Upon this report respondents entered a judgment against Elizabeth S. Baldwin as executrix. From this judgment defendant appealed to this General Term, and as one of the objections insisted that there was no direction that it be entered as required by section 1022 of the Code of Civil Procedure, and that the clerk in entering the judgment in form as he did acted without authority. For the reason undoubtedly that one could not appeal from a judgment as regular and at the same time raise a question of irregularity, this Court dismissed the appeal "without prejudice to the right of the appellant to appeal from any judgment herein which may hereafter be entered." The report of the referee was never amended, nor was anything done by either party to correct the error, and upon the judgment being introduced on the accounting it was objected to by the executrix on the ground that it was unauthorized and void because entered by the clerk without authority and in the absence of any direction by the referee, as required by section 1022 of the Code of Civil Procedure, and for the reason that the referee reported that the plaintiffs in that action were entitled to judgment against the defendant Elizabeth S. Baldwin, whereas the judgment entered was against Elizabeth S. Baldwin as executrix (Clason *v.* Baldwin, 18 *N. Y. Supp.* 371). Notwithstanding the intimation that the judgment thus entered was irregular and unauthorized, as stated, nothing was done to correct the defect in its entry, and the judgment roll was admitted in evidence on the accounting upon the authority of two cases (Devlin *v.* The Mayor, 27 *Abb. N. C.*, 311; Hinds *v.* Kellogg, 133 *N. Y.* 536) decided since the decision of Clason *v.* Baldwin (*supra*), in which, it is asserted, a different view was taken by the Court of Appeals.

In Devlin *v.* The Mayor, although the report of the referee did not determine the question as to the right of the defendants between themselves, and therefore did not comply with the Code of Civil Procedure, section 1022, by directing the judgment to be entered, this was held not to affect the judgment which was subsequently entered for the following reasons stated in the opinion of the Special Term: "The parties in suit have stipulated as to the respective amounts to be paid to each person. The Corporation Counsel * * * made a motion to compel the entry of judgment on such report. The form of this judgment was agreed upon and the order settled. I think it is now too late for the Counsel to the Corporation to raise the question presented, and that the defendant the Mayor must be regarded as having waived any irregularity there may have been in the order or report of the referee." And at the General Term it was said: "The report in concise and unmistakable terms settled the form and amount of the several judgments to be entered in favor of the plaintiff and the defendants other than the Mayor, &c. of New York, and this is a sufficient compliance with the requirements of section 1022 of the Code of Civil Procedure." In this opinion the case in the Court of Common Pleas of Hinds *v.* Kellogg (37 *St. Rep.*, 356) is cited and relied upon as an authority. In that case (Hinds *v.* Kellogg) it was held that the requirement of section 1022 of the Code "is satisfied if from the whole or a part of the record the particular form and terms of the judgment to which the successful party is entitled can be ascertained." This case was affirmed by the Court of Appeals (133 *N. Y.*, 536), and is therefore upon the point decided a controlling authority. There "the referee's conclusion of law in concise and unambiguous terms

states the amount of recovery to which the plaintiff is held to be entitled, and judgment thereupon was properly entered."

In the case under consideration, while the amount to which the plaintiff was entitled is definitely fixed, there is an inconsistency between the findings of fact and the conclusion of law as to the person against whom the referee reports, and the precise question here is, could the clerk, upon such a report and in the absence of any direction as to the judgment to be entered, disregard the referee's conclusion that the judgment was against the defendant individually and, as was here done, enter it against her as executrix? By section 1228 of the Code it is provided that "judgment upon such a report, or upon the decision of the Court upon the trial of the whole issue of fact without a jury, may be entered by the clerk as directed therein upon filing the decision or report." This is undoubted authority in a proper case for the entry of a judgment by the clerk without application to the Court: but there seems to be neither statutory nor other authority which confers upon the clerk the right to exercise judicial functions in determining the one against whom the judgment is to be entered when in the report itself there is an inconsistency or a doubt as to the person against whom it should be entered.*

Upon examination of the entire report, it is evident that the clerk entered it against the proper person, but that he did it without authority is equally clear; and the question presented is whether that was a nullity or an irregularity. This General Term in-

* In the case of a trial before a court or referee, the clerk has no judicial functions, and no power except to enter the judgment directed by the court or referee. Paine *v.* Aldrich, 13 *N. Y. Supp.* 455.

clined to the view that it was a nullity, as shown by the opinion upon the former appeal; but the two cases referred to of Devlin *v.* The Mayor and Hinds *v.* Kellogg (*supra*), both of which have been affirmed in the Court of Appeals, seemingly support the view that a judgment so entered is an irregularity merely and does not render the judgment itself void. And in the opinion of the General Term in Hinds *v.* Kellogg authorities are cited in support of two propositions: (1) that an omission to apply to the Court for judgment where such application is necessary to the entry of judgment is an irregularity only and does not render the judgment void; (2) that so long as the judgment is permitted to stand its validity is in no wise affected or impaired because of any irregularity in the entry thereof.

While the cases cited are undoubted authority for the proposition that the mere absence in the report of a direction as to the judgment to be entered does not affect the validity of the judgment which has been entered in accordance with what from the report is clearly shown to have been the determination or decision of the referee, this is a very different thing from saying that, where an inconsistency appears in the report as to which of two persons the referee has decided against, such conflict can be reconciled or adjusted by the clerk in accordance with his notions of what may have been the conclusion to which the referee should have arrived, and of the form of judgment which he should have instructed him to enter. In one case the entering of a judgment upon a report in all other respects clear and unambiguous, and merely in the absence of a direction, may not involve the exercise of any judical power, but the reconciling of differences or inconsistencies in a referee's report

necessarily involves such exercise; and as we find neither statutory nor other authority for it, it would seem that the attempt to exercise such power would be more than an irregularity because unauthorized, and as a consequence a judgment so entered would be invalid and void.* If it is within the province of the clerk in a case like this, where the conclusion of the referee reads that one is individually indebted to another, to disregard this because of something else in the report and enter a judgment against such person as an executrix, then we do not see why the clerk would not be authorized, in a case where the referee in terms has decided as against one person, to say that the referee has made a mistake, and thereupon,

* It is not intended that the referee must formulate the judgment, but that provision is complied with if, from the report, the particular form and terms of the judgment to which the successful party is entitled can be ascertained. Hinds *v.* Kellogg, 13 *N. Y. Sup.* 922.

When the terms of the judgment to which the successful party is entitled are evident from the referee's report, his report is sufficient although it does not expressly direct such judgment. Gold *v.* Serrell, 51 *State Rep.* 141.

When the conclusions of law in a report clearly and unmistakably settle the form and amount of the judgment to be entered, this is a sufficient direction of the judgment to be entered. Devlin *v.* Mayor, 37 *St. Rep.* 508.

The Court is not authorized to substitute another judgment for that directed by a referee to whom a case has been sent for him to hear, determine and report. If, for any reason, the proceedings before the referee do not warrant the entry of a judgment conformably to his decision, no judgment can be rendered, and the motion for judgment must be simply denied. The party who desires further relief must make an application therefor. Schroeter *v.* Schroeter, 23 *Hun*, 230.

The judgment must not contain provisions not embraced in the decision. Loeschigk *v.* Addison, 3 *Rob.* 331.

The judge's decision is the only authority for entering judgments. Chamberlain *v.* Dempsey, 14 *Abb.* 241.

without direction from the Court or referee, to enter judgment against an entirely different person if in his opinion that was the logical conclusion to draw from a reading of the entire report. We think that no such duty devolves upon the clerk and that, should he assume any such functions, his act in so doing is unauthorized and void.

When the judgment roll was presented in evidence, this defect appeared upon the face of the record, and the objection to it was properly taken; and it is no answer to say that because the judgment was permitted to stand its validity could not thereafter be assailed, because it is only in respect to irregularities or informalities in the entry that it is to be regarded as valid while it stands, but it has no such binding force when the defect apparent upon the face of the judgment roll shows that the judgment itself is a nullity, because that question can be raised at any time when the judgment is sought to be enforced. As said in Brush *v.* Brown (103 *N. Y.* 684): "It is in the discretion of the Court in which the judgment is entered to set it aside or to leave the party to set up its invalidity when an attempt is made to enforce it" (see also Foote *v.* Lathrop, 41 *N. Y.* 358; Abram French Co. *v.* Marx, 10 *Misc.*, 381). Here, then, the invalidity of the judgment appearing upon the face of the record, the question could be raised whenever the judgment was offered in evidence. It having been so offered and, against objection, having been admitted, this was error which lies at the basis of the Surrogate's decree.

The decree therefore should be reversed, with costs.

All concur.

# CITY OF BROOKLYN *v.* LONG ISLAND WATER-SUPPLY CO.

SUPREME COURT, GENERAL TERM, SECOND DEPARTMENT, JUNE, 1895.

§§ 3240, 3372.

*Extra allowance in condemnation proceedings.*

Section 3240 of the Code of Civil Procedure, authorizing an award of costs in special proceedings at the same rates allowed for similar services in actions, does not empower the court to grant an extra allowance.

Section 3372 of the Code of Civil Procedure, which provides for the granting of costs and an extra allowance in condemnation proceedings, where the compensation awarded exceeds the amount of the offer, with interest, applies only to proceedings instituted under the general condemnation law, and not to those under a special statue which does not hold an offer necessary. 24 *Civ. Pro. R.* 117, reversed.

(*Decided June*, 1895.)

Appeal from an order of the Special Term, Kings County, granting an extra allowance to the defendant company.

*Henry Yonge*, for appellant,

*Thomas E. Pearsall*, for respondent.

BROWN, P. J.—I am of the opinion that the Court had no power to grant the order appealed from. Section 3240 of the Code of Civil Procedure authorizes an award of costs in special proceedings at the same rates allowed for similar services in actions. But this section does not empower the Court to grant an extra

allowance. *In re* Holden, 126 *N. Y.* 589, 27 *N. E.* 1063. This proceeding was not instituted under the general condemnation law, but pursuant to chapter 481, Laws 1892, and therefore the order cannot be sustained under section 3372 of the Code. Moreover, the conditions do not exist under which, alone, costs and allowance can be granted to a property owner under the latter section. That section provides for an offer by the plaintiff to purchase the property, which it proposes to take at a specified price. If the offer is not accepted, and the compensation awarded by the commission does not exceed the amount of the offer, with interest from the time it was made, no costs can be allowed either party; and it is only when the compensation awarded exceeds the amount of the offer, with interest, as aforesaid, that the Court may grant costs and an allowance to defendant, to be paid by the plaintiff. No offer was made by the city in this case, and none was necessary under the act which authorizes this proceeding.

The order must be reversed, and the motion denied.

DYKMAN, J., concurs. PRATT, J., dissents.

## ELLEN J. ORR, PLAINTIFF, v. MARY W. CURRIE, DEFENDANT.

SUPREME COURT, SPECIAL TERM CHAMBERS, NEW YORK COUNTY, SEPTEMBER, 1895.

§ 439.

*Order of publication of summons——affidavit insufficient to support.*

An order for the service of a summons by publication upon a defendant will not be supported where the affidavit upon which it is founded fails to state that "the plaintiff has been or will be unable, with due diligence, to make personal service of the summons." The allegation that "plaintiff will be unable to make personal service of the summons" is not sufficient.

Such a recital in the order is a judicial finding, and the court must be satisfied upon the facts, and not because the plaintiff is satisfied by reason of facts which he does not disclose.

(*Decided September*, 1895).

Motion to set aside an order of publication of the summons on the ground of the insufficiency of the affidavit.

*Clarence D. Cruikshank*, for plaintiff,

*John J. Adams*, for defendant.

BEEKMAN, J.—This is a motion to set aside an order of publication of the summons on the ground of the insufficiency of the affidavit. The affidavit reads as follows: "That heretofore and on the 24th day of June, 1895, an attachment was issued against the defendant as a non-resident of the State of New York, upon an action for breach of contract other than a

contract to marry, as is more particularly stated in the verified complaint hereto annexed; that defendant resides at 440 Maple avenue, Elizabeth, New Jersey; is of full age, and that plaintiff will be unable to make personal service of a summons upon said defendant; that the sources of my information and the grounds of my belief are correspondence had with defendant from her said residence in New Jersey, and from conversations had with the son and representative of the defendant.

"That the summons was duly issued herein, but by reason of non-residence of the defendant as aforesaid, has not been served. That no previous application for an order of publication has been made herein."

It is contended on behalf of the defendant that the affidavit was absolutely barren of any proof from which the learned Justice who granted the order could conclude that the plaintiff would be unable with due diligence to make personal service of the summons upon the defendant as the order recites. The rule undoubtedly is that such a recital in the order is a judicial finding, and is therefore to be supported, if there is any evidence, even though it be slight, from which an inference might fairly be drawn that due diligence, or, as it has been phrased, ordinary and suitable diligence, considering the facts and circumstances peculiar to the case, has been employed. But where the affidavit is entirely barren in its statements of facts, so that it becomes a matter of pure speculation as to the grounds upon which the applicant bases his claim to the order, the recital or finding of the Judge cannot be accepted as a sufficient support for his order. The proceeding is a jurisdictional one, through which the property rights of those beyond the juris-

diction of the Court are to be affected, and the statutory basis for the order must appear upon the record to give it vitality.

The Courts have gone very far in their efforts to support such orders, and the rule seems to be that they should be sustained if the papers upon which they are founded contain any evidence from which it may fairly be inferred that the case is one within the statute. The rule is a reasonable one—at least it is one which I have attempted to follow in my efforts to uphold the order in question. I have, however, been forced to the conclusion that the affidavit in this case does not respond to the test of even this mild principle, and that the order resting upon it is therefore fatally defective. It will be observed that the only fact relevant to the point of the objection which it states is: "That defendant resides at 440 Maple avenue, Elizabeth, New Jersey, is of full age, and that plaintiff will be unable to make personal service of a summons upon said defendant." It will be noticed that the affiant does not state that he will be unable, to make the service "after due diligence," in the words of the statute. Had he done so, this case would have come nearer to that of Kennedy *v.* The N. Y. L. Ins. & Trust Co. (101 *N. Y.* 487), in which the Court says (p. 489): "The statement as to due diligence is not absolutely an allegation of a conclusion of law, or an opinion, but *in connection with what follows*, a statement of facts which tend to establish that due diligence has been used."

In that case, as the opinion shows, the affidavit stated that the defendants "cannot after due diligence be found within this State," they being residents of other States, as therein named, and "that the summons herein was duly issued for said defendants, but

cannot be personally served upon them by reason of such non-residence." The comment of the Court upon this is as follows: "Here is a clear statement that the defendants are non-residents of the State, and reside in other and distant States, and that the summons which has been issued cannot be served by reason thereof. * * * The allegation as to non-residence is preceded by the statement that the defendants cannot, after due diligence, be found within the State, which, taken in connection with the subsequent averment as to non-residence, may be considered, we think, as a statement either that an attempt has been made to find the defendants, or at least that they are so remotely located out of the State and have such a fixed residence there that it would be impossible after due diligence to find them within the State for the purpose of serving the summons on them."

An examination, however, of the affidavit under consideration will immediately disclose the fact that it falls far short of the facts upon which the reasoning in the above quoted case rests. There is no averment of "due diligence." The statement is "that the plaintiff will be unable to make personal service of a summons upon said defendant." The gravity of this omission is demonstrated in the case of McCracken *v.* Flanagan (127 *N. Y.* 493), where the Court says (p. 496) that if due diligence was to be inferred from the statement that the defendant cannot be found within the State "the Legislature would doubtless have been satisfied to have the affidavit state that the defendant cannot be found within the State, and not have superadded thereto the phrase 'after due diligence.'"

Furthermore, the inferences which were considered allowable in the case of Kennedy *v.* N. Y. L. Ins. & Trust Co. (*supra*), from the fact that the residence of

the party proceeded against was in a distant State, find no place in the case under consideration, where the defendant is alleged to reside in a border State, at a place close to the boundary, and where hundreds reside who daily transact their business within the City of New York (Carlton *v.* Carlton, 85 *N. Y.* 313).

I have examined the other cases to which I have been referred by the counsel for the plaintiff, and in each of them the affidavit expressly states, not only that the defendants reside in some other State, *but also that they are actually there at the time* (Lockwood *v.* Brentley, 31 *Hun*, 155; Chase *v.* Lawson, 36 *Hun*, 221; Jerome *v.* Flagg, 48 *Hun*, 351). Nor is the plaintiff helped by the allegation in the affidavit under consideration "that the sources of his information and the grounds of his belief are correspondence had with the defendant from her said residence in New Jersey and from conversations had with the son and representative of the defendant." What was written and what was said do not appear, and the Court is without the slightest information of the facts themselves upon which to determine whether service could or could not be had with the exercise of due diligence. The whole clause has the effect, and only the effect, of making the previous averment of the affidavit on information and belief.

As was said by Mr. Justice Van Brunt in the case of Ladenburg *v.* Commercial Bank, 87 *Hun*, 269 (at page 275): "Where a party alleges upon information and belief and states that the sources of his information are certain writings, the Court is entitled to know what the writings are, in order to see whether the affiant is justified in his belief or not. The Court must be satisfied upon the facts, and not because the plaintiff is satisfied by reason of facts which he does not disclose.

Upon a careful consideration of the whole affidavit in this case, I find myself unable upon the authorities to reach any other conclusion than that it is radically deficient. Had it contained a statement of facts which would sustain the conclusion that the defendant could not after due diligence be served within the State, or, possibly, if upon the meagre statement presented the averment had been that the plaintiff would not be able so to serve the defendant after due diligence, the order would have been sustainable; but in the absence of either of these conditions, the affidavit, even under the most favorable of the decisions which may be regarded as authorities, fails to support the order. It follows that the order must be vacated.

Motion granted, with $10 costs.

NOTE ON SUFFICIENCY OF AFFIDAVIT TO SUPPORT ORDER OF PUBLICATION OF SUMMONS.

The existence of the grounds for ordering service by publication is a jurisdictional fact, and the *ex parte* determination of the Court as to their existence is not conclusive. (Fiske *v.* Anderson, 12 *Abb.* 8.)

The requirements of the Code must be strictly complied with. (Kendall *v.* Washburn, 14 *How. Pr.* 380. Hallett *v.* Righters, 13; *How. Pr.* 43; Cook *v.* Farren, 34 *Barb.* 95; Wortman *v.* Wortman, 17 *Abb.* 66.)

If the evidence has the legal tendency to prove the facts requisite to confer jurisdiction to make the order, then it is valid, although the proof was slight and inconclusive. (Carleton *v.* Carleton, 23 *Hun*, 251.)

It is sufficient if the proof has a legal tendency to make out in all its parts a case for the action of the judge. (Schroeder *v.* Lear, 17 *Weekly Dig.* 574.)

In order to defeat the jurisdiction there must be a total want of evidence on some essential points. (*Id.*)

While great caution should be experienced in granting orders of publication, and parties should be treated liberally in opening judgments if injustice has been done, mere technical objections should

not be held to invalidate a judgment upon which the title to real estate depends. (Smith *v.* Matson, 47 *How. Pr.* 118.)

The determination of the judge as to the sufficiency of the proof cannot be collaterally impeached. (Walker *v.* Reiff, 13 *Weekly Digest*, 331.)

Where there is a total absence of proof of the jurisdictional facts, the order for publication and all proceedings founded upon it are absolutely void. (Towsley *v.* McDonald, 32 *Barb.* 604.)

So where it shows no attempt to serve. (Wortman *v.* Wortman, 17 *Abb.* 66.)

**Necessary Statements in Affidavit.**—The affidavit should state that the summons and complaint have been prepared, that due diligence to serve them has been used without success; that a cause of action exists, and that defendant is a resident of the State or has property therein. (Rawdon *v.* Corbin, 3 *How. Pr.* 416; Vernam *v.* Holbrook, 5 *How. Pr.* 3.)

Must show defendant's residence or that it is not known to plaintiff, and cannot, with due digilence, be ascertained. (Hyatt *v.* Wagenright, 18 *How. Pr.* 248.)

**Information and Belief.**—It is no objection to an affidavit that some of the allegations as to non-residence are stated on information and belief; and these are proper to be considered upon the application. (Howe Mach. Co. *v.* Pettibone, 74 *N. Y.* 68.)

Affidavit of non-residence, on information and belief, is sufficient. (Steinle *v.* Bell, 12 *Abb. N. S.* 171; Van Wyck *v.* Hardy, 11 *Abb.* 473.)

**Due Diligence.**—Some effort or diligence to make personal service in the State is necessary. What is suitable and proper diligence may depend somewhat upon the peculiar facts and circumstances of each case. The statute uses the well-understood term, due diligence, which intends not diligence extraordinary or extreme, but only proper and suitable. (Chase *v.* Lawson, 36 *Hun.* 221; Wunnenberg *v.* Gearty, 36 *Hun.* 243.)

Plaintiff must show that he has been, or will be, unable with due diligence to make personal service. (Bingham *v.* Bingham, 3 *How. N. S.*, 116; Campbell *v.* Taylor, 9 *Weekly Dig.* 14.)

Where the affidavit stated that defendants resided in places named, but did not show that any efforts had been made to find them nor that they could not, with due diligence be found in the State, it was held insufficient, and title obtained under it was set aside. The affidavit must show what has been done to find them. (Bixby *v.* Smith, 3 *Hun.* 60.)

A statement that "deponent has not been able to find defendant within this State, though he has searched and inquired for him at all

the places therein where said defendant would be most likely to be found" does not show that personal service cannot with due diligence be made within the State. (Putnam v. Griffin, 19 *Weekly Dig.* 46.)

**Non-residence.**—Non-residence alone is not sufficient. (Peck v. Cook, 41 *Barb.* 549; Wortman v. Wortman, 17 *Abb.* 66; Waffle v. Goble, 53 *Barb.* 517; Fetes v. Volmer, 28 *State Rep.* 317; Hyatt v. Swivel, 52 *N. Y. Supr.* 1.)

An affidavit merely stating that a party is a resident of a State named gives no jurisdiction. (Argall v. Bachrach, 18 *Weekly Dig.* 267.)

The fact of non-residence is evidence that he cannot be found in the State. (Vernam v. Holbrook, 5 *How. Pr.* 8; Rowden v. Corbin, 3 *How. Pr.* 416; Bixby v. Smith, 3 *Hun.* 60.)

---

## JAMES RIDGWAY AS RECEIVER, ETC., PLAINTIFF, v. SAMUEL SYMONS, AS RECEIVER, ETC., DEFENDANT.

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW YORK COUNTY, SEPTEMBER, 1895.

§§ 3271, 3272.

*Order requiring plaintiff as receiver to file security for costs should be made by the court—discretionary—will not be granted unless action is brought in bad faith.*

The granting of an order requiring plaintiff as receiver to file security for costs rests in the discretion of the court, and the power will be exercised under well settled principles, only where it appears not only that the receiver is without funds applicable to payment of costs, but also that the action has been brought in bad faith or heedlessly, or without reasonable prospect of success.

An application made under section 3271 of the Code of Civil Procedure to compel plaintiff as receiver to give security for costs cannot be made by a judge. The order must be granted by the Court.

(*Decided September*, 1895.)

Motion to vacate an order requiring the plaintiff to give security for costs.

*Gilbert R. Hawes*, for plaintiff.

*Goldfogle & Cohen*, for defendant.

BEEKMAN, J.—This is a motion to vacate an order requiring the plaintiff to give security for costs. The order was made *ex parte*. The granting of such an order against a receiver rests in the discretion of the Court, and the power will be exercised under well settled principles, only where it appears not only that the receiver is without funds applicable to the payment of costs, but also that the action has been brought in bad faith or heedlessly, or without reasonable prospect of success (Bennett *v.* Goble, 43 *Hun*, 354; Rutherford *v.* Town of Madrid, 77 *Hun*, 545; Hale *v.* The St. Lawrence Mfg. Co., 86 *Hun*, 499).* The

* On a motion to compel a receiver to give security on the ground that he has no funds in his hands, it must be shown that the action is brought in bad faith or heedlessly. (Jenkins *v.* Stow, 2 *Law Bull.* 57.)

The fact that the action was commenced without leave of the Court having been first obtained, and that plaintiff, as receiver, had no funds, and no prospect of any, other than such as might result from this action, might properly be considered by the Court in making an order for security after dismissal of his complaint. (Gifford *v.* Rising, 48 *Hun.* 128; 14 *Civ. Pro. R.* 172.)

Where bad faith in a receiver in commencing the action is shown, he will be required to give security. (Kimberly *v.* Goodrich, 22 *How. Pr.* 424.)

An *ex parte* order giving a receiver leave to sue, is not a bar to a motion requiring him to give security. (Bolles *v.* Duff, 17 *Abb.* 448.)

An order requiring a receiver to give security is not appealable, except for irregularity in granting or procuring it. (*Id.*)

Whether a receiver of an insolvent corporation who is plaintiff shall give security is within the discretion of the Court, at Special Term, and its order is not appealable to General Term or Court of Appeals. (Briggs *v.* Vandenburgh, 22 *N. Y.* 467.)

plaintiff has brought this action by permission of the Court. The charge that he has done so to harass and annoy the defendant is hardly sufficient upon which to base a finding of bad faith in the absence of satisfactory evidence to that effect. Nor am I prepared to hold, upon the papers submitted to me, that the plaintiff has no reasonable prospect of success in the action. In view of the above considerations the order should not have been granted. But there is another objection which affects its validity. The application was necessarily made under section 3271 of the Code of Civil Procedure. An order under that section must be made by the Court; it cannot be made by a Judge (section 3272, Code of Civil Procedure). The order in question was not a Court order, and was therefore invalid.

Motion granted, with costs to abide the event.

---

## *In re* WILL OF JOHN OLIVER.

SURROGATE'S COURT, NEW YORK COUNTY, JULY, 1895.

§ 2620.

*Probate of will upon proof of handwriting of testator and subscribing witnesses.*

Where one witness to a will has died and the other disappeared, and not been heard of for six or seven years, but proof of the handwritings of both testator and deceased witnesses is adduced; and the will is reasonable in its provisions when the circumstances of the family are considered, the scheme of which was suggested in part, but as a whole was approved by the testator; taken with his declarations as to the manner in which it was executed, showing that he knew the requisites of execution and that all the acts were in conformity with the statute; and the

**whole transaction from beginning to end being in apparent good faith, with nothing to raise a suspicion to the contrary, and the paper having been preserved for ten years, with no suggestion of dissatisfaction with its provisions, *Held*, these facts are sufficient to admit the will in evidence on the trial of an action, when its admission would be conclusive of the rights of the parties to the controversy and consequently, under section 2620 of the Code of Civil Procedure, the will is entitled to probate.**

(*Decided July*, 1895.)

Application for probate of will.

The facts are stated in the opinion.

*David May*, for proponent.

*James E. Kelly*, Special Guardian, opposed.

FITZGERALD, S.—The paper propounded was executed in 1885. The decedent was a steamboatman doing business between Albany and New York. His wife, at the date of the instrument and afterwards, was a person of unsound mind, and she continued in the same condition more or less until her death. He left a son, who was also of unsound mind and an inmate of an institution for the insane. The estate, by the paper, was left in trust to his daughter, Mrs. Fyle, to be expended by her as she might deem wise for the maintenance of his wife, and upon her death, should there be any residue, it is to go to Mrs. Fyle, with the understanding that should the son require any assistance, she should devote what would seem to her proper for that purpose. Mrs. Fyle is named as executrix. The paper was attested by John Featherly, Jr., and S. V. R. Ableman as witnesses. Ableman died soon after the death of the decedent, and the witness Featherly disappeared and has not been heard of for six or seven years. The legal presumption under the circumstances is that he also is dead. There is no person living who is known to have been present at

the execution, and there is no written recital in the instrument of the facts which occurred at the time. Only the handwritings in the signatures of the testator and the subscribing witnesses are proved. Objections were filed to the probate of the paper in behalf of the widow, alleging that it was not properly executed. She has since died. The special guardian of the insane son has continued the contest.

Under the laws of this State, before admitting a testamentary paper to probate, two, at least, of the subscribing witnesses must be produced and examined if so many are within the State (*Code*, § 2618). The Surrogate must be satisfied of the validity of its execution (*sec.* 2622). To constitute a valid execution, the testator must sign the instrument at the end or acknowledge his signature to each of not less than two witnesses, and must at the same time declare to them that it is his will, and the witnesses shall sign it at the end by the testator's request (2 *R. S.* 63, sec. 40). It frequently happens that, in a literal sense, these requirements are not complied with. In a liberal spirit the Courts hold that a substantial compliance is sufficient (Matter of Voorhis, 125 *N. Y.* 765).

That testamentary purpose may not miscarry, the law, in the spirit of equity and justice, provides that, if all of the subscribing witnesses are dead, a will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses, and "such other circumstances as would be sufficient to prove the will upon the trial of an action." (*Code*, § 2620). This provision is a substantial reproduction of the language of section 20, chapter 460, Laws of 1837, which has been a subject of adjudication in our courts when it was sought to introduce wills in evidence in trials at law.

In Jackson *v.* LaGrange (19 *John.* 386) one of the witnesses to the will was dead and the second failed to recall the circumstances attending the execution. Because the third witness, who was shown to be living and within the jurisdiction of the Court, was not called that "he might prove or disprove the facts," the will was not received in evidence. But the Court was of the opinion that if the recollection of the third witness had also failed, if he could prove his own signature and that of the testator, the execution of the will was sufficiently proved to entitle it to be read. In a summarized statement of the law Chief Justice Spencer, who delivered the opinion of the Court said: "If the subscribing witnesses to a will are dead, then proof of their signatures and that of the testator is sufficient. Jackson *v.* Hickory (1 *Wend.* 406) is a similar case. The Court held, when one subscribing witness was unable to prove that all the requirements of the statute had been complied with, the other witnesses to the transaction, if living and within the jurisdiction of the Court, ought to have been called, but if they were dead, then their handwriting and that of the testator should also be proved, and the jury from such evidence would be authorized in inferring that the requirements of the statute had been complied with. In Jauncey *v.* Thorn (2 *Barb. Ch.* at page 59) the Chancellor states that the most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice where, from lapse of time or otherwise, it may be impossible to give positive evidence on the subject; and, where any of the subscribing witnesses are dead, proof of their signatures is received as secondary evidence of the facts to which they have attested in subscribing the will as witnesses of its execution. So, in Cheeney *v.* Arnold

(18 *Barb.* 438) it is held if the witnesses were all dead, proof of their handwriting would be sufficient to establish the due execution of the instrument by the testator. And again, in Everitt *v.* Everitt (41 *id.* 385), "If the witnesses are men of good character, and there is no doubt as to their signatures or any other suspicious circumstances, the attestation clause would be deemed sufficient evidence of a request. In short, the law lays down no stubborn, inflexible rule in such cases, but accepts the best evidence that can be procured subject to the nature of human affairs and human infirmities and casualties to establish the fact in controversy." "Nor are the provisions of the statute," as stated in Lawrence *v.* Norton (45 *id.* 448), "such as to preclude the admission of the will when some of the witnesses are dead and others do not remember the occurrence."

In Butler *v.* Benson (1 *id.* 226) it was held that the law, after the diligent production of all the evidence then existing, if there were no circumstances of suspicion, presumed the instrument properly executed, particularly when the attestation clause was full. To the same effect are Rugg *v.* Rugg (83 *N. Y.* 494) and the Matter of Pepoon (91 *N. Y.* 285); and in most of the cases in which validity of the execution of a will was in question when there was no witness living to prove the facts, the existence of an attestation clause, reciting the necessary facts that occurred at the time of the execution, has been an important factor in determining the decision of the courts. But to give the attestation clause force as evidence is a generous interpretation of the statute, in the language of which there is nothing to make it such. It is "proof of handwriting" that is prescribed. It is only under the decisions that an attestation certificate signed b- the

witnesses is admitted in aid of probate. For it is well settled that an attestation clause is no part of a will and is not required as part of its execution, but when the witnesses are dead it may be presumptive evidence of due execution (Jackson *v.* Jackson, 39 *N. Y.* 153); and when the witnesses are living it may enable them to recall the facts, if they do not recollect them without. * * * Under the statute, all that is required in addition to proof of the handwriting of the testator and the subscribing witnesses is "such other circumstances as would be sufficient to prove the will upon the trial of an action."

What were the circumstances under which the will of John Oliver was prepared and executed? An insane wife and an insane son were not competent for self-care to look after an estate. Mr. Fyle, the son-in-law of Mr. Oliver, and who at his request drafted the paper, states that in giving him the instructions Mr. Oliver referred to his wife's mental condition, stating that it was his wish to give his estate out and out to Mrs. Fyle, and that it was at his (Fyle's) suggestion, that the paper took the form in which it was executed and by which provision for his wife and son was made directory. To some one must be intrusted their care, and who was better fitted than the daughter and sister of the unfortunates?

Mr. Fyle is a journalist and a literary man—not a lawyer, though he states he knew the manner in which wills should be executed. The scheme of the instrument is clearly expressed. If Mr. Fyle's testimony is to be credited, after the paper was typewritten it was delivered to Mr. Oliver as he was about to leave for Albany, with instructions as to the manner of its execution. From the fact that both subscribing witnesses were residents of that city, it is a reasonable

conclusion that the paper was signed there. Mr. Oliver on his return to this city, Mr. Fyle states, came to him and stated that the paper had been executed there and told him the manner in which it was done. Though Mr. Fyle's statement did not in the first instance mention that the decedent told him that he had requested the witnesses to sign the paper, before he left the stand he recalled and testified to the fact, and it is hardly conceivable under the circumstances that they would have signed their names except upon his request.

I am aware that the competency of proof of the declarations of a testator has been called in question in the past. In the leading case of Waterman *v.* Whitney (11 *N. Y.* 151) the subject was learnedly considered by Judge Selden in respect to the declarations of a testator after the execution of a will, to the effect that he had disposed of his property in a manner entirely different from the disposition shown in the will, and it was held that no such declarations were competent as evidence of the facts, except they were part of the *res gestæ* at the time of the execution but were competent as evidence of the testator's mental condition.

The question was again considered in the Matter of Marsh, (45 *Hun* 107), in a proceeding to establish a lost will. On the trial, the declarations of the testatrix, made from time to time and to within a short time of her death, that she had made a will and had given her property to the person who was named therein, were admitted. Judge Bradley, who delivered the opinion of the Court on the appeal, draws a distinction between declarations of a testator, the purpose of which is to work the revocation of a will and those which tend to sustain it. In my view his

reasoning is correct. But the declarations of Mr. Oliver were taken without objection. Under the decision in the Matter of Marsh (*supra*), they would have been competent even if objected to.

But on the main point—that of execution—I have found no case in this State all the facts of which are like the one before me. The Matter of O'Hare (2 *Law Bulletin*, 83), decided by Surrogate Calvin, was one in which the two subscribing witnesses had died, but whose handwritings were proved. It was shown also that one of the witnesses was an attorney and that the instrument was found among the decedent's private papers after his decease. The question at issue was whether, upon these facts alone, there was sufficient proof of the handwriting of the testator as would be proper to prove the will on a trial at law under the statute. The Surrogate held that the language of the statute seemed to qualify the requirements and assimilate the proof to that necessary on a trial at law, and he was of the opinion, if it should be impossible to prove the handwriting of the testator, that fact would not present an insuperable obstacle to clear proof of the instrument and its admission to probate as a will of personal property.

In Rider *v.* Legg (51 *Barb.* 260), it was held that the proof of the signatures of two of the three subscribing witnesses to a will, and who were deceased, was sufficient, after a lapse of time, to justify the reception of the will as evidence without proof of the signatures of the other subscribing witnesses and of the testator.

But the case, the facts of which are nearest like those of the one before me, is found in the English reports—The Goods of Jane Thomas (1 *Swabey and Tristam*, 255). In that case there was no attestation

clause. Two witnesses were dead, and the third testified that he remembered being requested by the testatrix to attest her signature to the will, and that she did sign her name in his presence, and that he thereupon subscribed his name in her presence. After an interval of so many years he was unable to recollect all the circumstances attending his subscription, but, as he remembered, the testatrix and he were the only persons present at the time, and that the signatures of John and Mary Skeggs, which appeared subscribed to the will immediately under his signature, were not subscribed in his presence. He did remember that he made a suggestion to deceased, at the time he subscribed the will, that another witness ought to be present, but what further passed on the subject he was unable to recollect. It appeared from the case that both John and Mary Skeggs were dead, and that they had been people of some consequence. Their handwritings were proved. Sir C. Creswell in deciding the case said: "I think I may fairly assume that the will was duly executed. The first subscribing witness who survives states in the affidavit that he explained to the testatrix that two subscribing witnesses were required to be present at the execution of a will, and it appeared that some time afterward the testatrix obtained the signatures of two other witnesses. It is a fair presumption that she acted upon the information given her and got the last two witnesses in order that she might acknowledge her signature in their presence. Probate was granted.

The liberality of the Courts in their desire to sustain testamentary instruments, when there are no circumstances of suspicion attaching to the execution, is illustrated by another English case—The Goods of Ashmore (3 *Curteis*, 757)— in which the will was

attested by the marks of the two subscribing witnesses both of whom were dead, and there was no person living who was present at the execution to testify to the making of the marks, and yet the will was admitted to probate. Applying the principles stated to the case under consideration, I have no doubt of what my determination should be. I have before me proof of the handwritings of the testator and of the deceased witnesses; a will reasonable in its provisions when the circumstances of the family are considered, the scheme of which was suggested in part, but as a whole was approved by the testator; his declarations as to the manner in which it was executed, showing that he knew the requisites of execution and that all the acts were in conformity with the statute; and the whole transaction from beginning to end in apparent good faith with nothing to raise a suspicion to the contrary; and the paper was preserved for ten years with no suggestion of dissatisfaction with its provisions. These facts under the decisions would be ample proof to admit the will in evidence on the trial of an action, when its admission might go far to determine, if it would not be conclusive of the rights of the parties to the controversy; and under section 2620 of the Code already cited, the facts are equally effective to prove its execution in a special proceeding on the probate of a will in this Court.

I hold that the will was duly executed and I will sign a decree admitting it to probate.

# PATRICK McNAMARA v. JOHN P. NOLAN.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, JUNE, 1895.

§§ 458, 467, 3191.

*Order permitting prosecution as "poor person" appealable because affecting a substantial right—what is necessary to the validity of the order.*

The right to costs given to litigants by statute is a substantial one and where the effect of the order appealed from, such as an order permitting plaintiff to sue as a poor person, is to deprive the defendant of his costs, if the issue of the action proves to be in his favor, it affects a substantial right, and so is appealable to the Court of Common Pleas under section 3191 *subd.* 3 of the Code of Civil Procedure.

The Code does not require the plaintiff as a condition precedent to the order permitting him to prosecute as a poor person, to prove his right to recover in the action. It is sufficient if the Court to which the application for such an order is addressed is "satisfied" that the applicant "has a good cause of action."

Where it sufficiently appears from the record, as constituents to the validity of the order, that the plaintiff is a "poor person" within the proper meaning of those words, and secondly that he has, *prima facie*, a cause of action against the defendant, no reversal of the order should follow upon a mere conflict of evidence.

(*Decided June*, 1895.)

Appeal from an order of the General Term of the City Court of New York, which affirmed an order, made at Special Term, permitting the plaintiff to prosecute the action as a poor person.

Action against a physician to recover damages for the alleged unskillful medical treatment of the plaintiff's child, a minor.

*J. J. Karbry O'Kennedy*, for respondent.

*John R. Tresidder*, for appellant.

BISCHOFF, J.—The action is against a physician to recover damages for the alleged unskillful medical treatment of the plaintiff's child, a minor, and from an order made at Special Term in the Court below, and by the same Court affirmed at General Term, permitting the plaintiff to prosecute as a poor person (*Code Civ. Pro.* §§ 458-467); the defendant has appealed to this Court.

The right to costs given to litigants by statute is a substantial one (Sturgis, *et al.*, as The Bd. of Comm'rs of Pilots *v.* Spofford, *et al.*, ex'rs. &c., 58 *N. Y.* 103); and as the effect of the order appealed from is to deprive the defendant of his costs, if the issue of the action proves to be in his favor, it effects a substantial right, and so is appealable to this Court under the provisions of the *Code of Civil Procedure* (sec. 3191, *subd.* 3).

It is contended for the appellant that the order is erroneous for two reasons—firstly, that the plaintiff does not appear to be a "poor person" within the proper meaning of those words; and secondly, that it does not satisfactorily appear that he has, *prima facie*, a cause of action against the defendant (*Code Civ. Pro.* § 460). We are of the opinion, however, that both of these constituents to the validity of the order sufficiently appear from the record, and upon a mere conflict of evidence no reversal should follow. An appellate Court should only then reverse upon the facts if the preponderance of the evidence is so greatly against the findings of the Court which made the order that there can be said to have been an abuse of judi-

cial discretion (Dietlin *v.* Regan, 46 *N. Y. State Rep.* 763), which is not here the case.

True, a "poor person" is one who is indigent, depending upon charity, a pauper; but the words also comprehend one who, though not a pauper, is not rich (*Century Dict.* "Poor"; *Am. & Eng. Ency. of Law*, vol. 18, p. 767, "Poor and Poor Laws," and cases collected in the notes). The Code, however, has wisely defined the "poor person" comprehended by its provisions to be one who "is not worth one hundred dollars besides the wearing apparel and furniture necessary for himself and his family, and the subject matter of the action" (sec. 459). That the plaintiff comes within this class clearly appears from his verified petition. The defendant's deposition is subject to discredit as that of a person in interest; but, waiving such consideration, there is nothing in his testimony that the plaintiff resides with his wife and child upon a second floor, consisting of four or five rooms, neatly and comfortably furnished, which in anywise conflicts with the plaintiff's allegations. The same is to be said with regard to the further facts that the plaintiff is employed and in receipt of fifteen dollars weekly wages.

The Code (§ 460) does not require the plaintiff, as a condition precedent to the order permitting him to prosecute as a poor person, to prove his right to recover in the action. The Court to which the application for such an order is addressed must be "satisfied" that the applicant "has a good cause of action." Obviously this implies no more than that the facts alleged must, if true, constitute a cause of action, and that the action is instituted in good faith. In other words, the Court is charged with the duty of refusing the order where the facts alleged for the purposes of a

recovery do not constitute a cause of action, or the action is not brought in good faith. Here the complaint concededly sets forth alleged facts which if established upon the trial, will entitle the plaintiff to recovery. Again, the depositions of the defendant's experts do not so controvert the plaintiff's allegations regarding the maltreatment of his child that the cause of action may be said to be absolutely disproved. As mere opinion evidence the statements of the experts are not conclusive of the facts to which they relate (Rogers on Expert Testimony, p. 486, § 207).

The order should be affirmed, with costs.

BOOKSTAVER, P. J., and PRYOR, J., concurred.

---

## STEPHEN R. FISK v. MARY FRANCES FISK.

NEW YORK SUPERIOR COURT, SPECIAL TERM, MAY, 1895.

§ 1743.

*Misrepresentation as ground for annulling marriage.*

A marriage will not be annulled upon the ground of fraud, because the defendant had falsly represented to plaintiff that she had never been previously married, even though the plaintiff was by such misrepresentation induced to marry the defendant.

It may be laid down as settled law that if a female represent herself as a maiden, and it transpires that she is a widow, or a divorced woman having the legal capacity to remarry; or a man represents himself as a bachelor, when he is a widower or a divorced man having the legal capacity to remarry, the misrepresentation would not go to the foundation of the marriage contract; but would be one of those frauds for which the law affords no relief.

(*Decided May*, 1895.)

Bill filed by plaintiff for annulment of marriage.

*A. Oakey Hall and J. P. Niemann*, for plaintiff.

*J. C. Coleman*, for defendant.

McADAM, J.—The plaintiff grounds his action upon the charge that the defendant falsely represented to him that she had never been previously married, when in fact she had been married to one Benjamin F. White, who was living at the time; the plaintiff being by such misrepresentation induced to marry the defendant.

While it is true that the defendant had been previously married to White, and that he was living at the time, it appears by an exemplified copy of the record of the Court of Common Pleas for the County of Philadelphia that the defendant had obtained an absolute divorce from White in that Court at the September Term, 1858, and that she was competent when the representations were made to contract marriage, particularly in the State of Pennsylvania, where such divorce was procured. The marriage with the plaintiff was contracted June 3, 1862, and was solemnized in Pennsylvania. So that the contract, apart from the question of fraud, was valid everywhere.

Assuming that the alleged representations were made, that they were untrue, that the plaintiff was deceived by them and induced to enter into a contract which he would not have made if he had known the facts, the question to be determined is whether the deceit was of that serious character which authorizes an annulment of the marriage.

Marriage is the cornerstone of the social fabric; and, unlike other contracts, that of marriage cannot be rescinded by the voluntary act of the parties. In-

deed the statute does not provide that fraud shall vitiate a contract of marriage, but only confers an authority on the Court to decree an annulment for such cause, if the nature of the fraud or the decree or amount of deception practiced be deemed sufficient to warrant the Court in declaring the contract void (*Code*, § 1743). This is left to be determined on general principles applicable to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage (Reynolds *v.* Reynolds, 3 *Allen*, at p. 606).

The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation and to insure the legitimacy of offspring.

In Long *v.* Long (17 *N. C.* at p. 308) the Court said: "There is in general no safe rule but this: The persons who marry agree to take each other as they are; and we cannot but say that nothing could be more dangerous than to allow those who have agreed to take each other in terms for better, for worse, to be permitted to say that one of the parties is worse than expected." Similar expressions will be found in Farr *v.* Farr (2 *McArth.* at p. 36), Carris *v.* Carris (24 *N. J. Eq.* at p. 522) and in 2 *Bish. on M. & D.* (ed. of 1891, secs. 459, 460).

In short, the one takes the other for better or worse, with all his or her past or present imperfections, and there is no going behind the ceremony. It may therefore be laid down as settled law that if a female represent herself as a maiden, and it turns out she is

a widow, or a divorced woman having the legal capacity to remarry; or a man represents himself as a bachelor, when he is a widower or a divorced man having the legal capacity to remarry, the misrepresentation would not go to the foundation of the marriage contract; it would be one of those frauds for which the law affords no relief (Clarke *v.* Clarke, 11 *Abb. Pr.* 228). And this upon the ground that the most serious considerations of public policy and good morals affect the relation and demand that it should be indissoluble except for the gravest causes.

The law wisely requires that persons who act on representations or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of "a blind credulity, however it may have been produced" (Reynolds *v.* Reynolds, *supra*, pp. 607, 608, 2 *Kent's Comm.* 77).

It follows that the complaint must be dismissed.

## MATTER OF JEROME AND LEONIE ALEXANDRE, INFANTS.

SURROGATE'S COURT, NEW YORK COUNTY, JUNE, 1895.

§§ 2827, 2830, 2852.

*Mother of infant can not be appointed testamentary guardian.*

The provisions of chapter 175, Laws of 1893, repealing the authority conferred by former statutes upon the father of an infant to appoint a testamentary guardian during the lifetime of the mother operates to prevent the appointment of the mother herself as such testamentary guardian even though, under section 2827 of the Code, she is entitled to letters of guardianship upon application therefor, and upon giving the security required by law. (*Decided June*, 1895.)

Application by mother of infants for letters of guardianship of their persons and estates.

*Frank L. Hall*, for the petitioner.

ARNOLD, S.—The petitioner is the mother of the infants in this proceeding, wherein she applies for letters of guardianship of their persons and estates. The father of the infants having deceased, the petitioner would be entitled to letters pursuant to the provisions of the Code, section 2827, upon proper application therefor, the minors being under the age of fourteen years. In such case security must be required of her (section 2830). But she makes application for letters, without bond, under section 2852, as a guardian appointed by will. Her petition therefor is based upon the provisions of the will of her deceased husband, the father of the minors, which was admitted to probate in this county on October 31, 1894, such petition having been duly presented within three

months thereafter. The testator, by his will, in terms, appointed his wife, the petitioner, guardian of such of his children as should be minors at the time of his death, which occurred August 8, 1894. By chapter 175, Laws of 1893, the Legislature of this State enacted an amendment to section 1, title 3, chapter 8 of the Second Part of the Revised Statutes. The effect of such amendment was considered by the General Term of the Supreme Court, in this district, in Matter of Schmidt, reported in 77 *Hun*, page 201, and it was there held that it repealed all authority conferred by former statutes upon the father to appoint a testamentary guardian during the lifetime of the mother, and that no such authority existed independent of statute. In that case the father, by will, undertook to appoint guardians of his minor children. His wife was not one of the appointees, but she gave her written assent that letters should be granted to the nominees of the will as testamentary guardians. The Court held that such assent did not remove the difficulty. It is argued here that the Legislature never could have contemplated a case like the present one, or intended to forbid the appointment by a parent, in his will, of the surviving parent as guardian of their minor children. But if the power to make such appointment did not exist at common law, and it is not conferred by any statute, no force can be given to it if its exercise is attempted. I cannot see that the fact that the attempted appointment is of the surviving parent alters the case. She can apply for letters of guardianship, and can obtain them upon giving the security required by law. This may involve some hardship; but that cannot be avoided. As the General Term suggests in its opinion in the case cited, it is not well to take any risks in such matters.

The application must be denied.

# THE GRAND LODGE KNIGHTS OF PYTHIAS OF THE STATE OF NEW YORK *v.* THE MANHATTAN SAVINGS INSTITUTION.

NEW YORK SUPERIOR COURT, SPECIAL TERM, JUNE, 1895.

§§ 2446, 2447.

*Effect of direction to third person to pay over made in supplementary proceedings.*

A third person who holds property of a judgment debtor and has been notified of a change of title thereto, and who subsequently obeys an order of the Court to pay over such property to the judgment creditor, is deemed to make such payment voluntarily and at his own peril.

The order taken by the judgment creditor should have been in the language of section 2446 of the Code "permitting" the defendant to pay to the Sheriff, it can have no greater effect.

Section 2447 of the Code, which authorizes a "direction" to pay applies only to money, in the hands of the judgment debtor. The provision therein directing delivery over by a third person applies to articles of personal property other than money, capable of delivery, and to which the title of the debtor is undisputed.

Where a party has notice sufficient to put him upon inquiry, he is chargeable with such knowledge as the inquiry would have disclosed if it had been properly made.

(*Decided June*, 1895).

Demurrer to complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The plaintiff was incorporated under and by virtue of chapter 375 of the Laws of 1880, with power to institute subordinate lodges. The objects were the promotion of friendship, charity and benevolence, and to aid members in case of sickness or death. The act declares that all funds raised to further these purposes

shall be exempt from process against the grand or any subordinate lodge, and that upon the dissolution or suspension of any subordinate lodge all the funds, &c., to its credit shall belong to and become the property of the grand lodge.

In 1894 the plaintiff granted a charter to certain members, whereby they were constituted a lodge of the order under the name of Independence Lodge. This lodge deposited certain moneys with the defendant and received from it a bank book numbered 136,-838, in which the amounts of the deposits were entered. Attached to the book is an extract from the charter and by-laws of the defendant, providing that no person shall have the right to demand any part of his principal or interest without producing such book, that the payments may be entered therein, and that sixty days' notice must be given before the money can be withdrawn.

On April 10, 1895, there was on deposit in defendant's bank $253.93. On the 23d of the preceding month Independence Lodge was duly suspended, whereupon the bank book, &c., were surrendered to the plaintiff, which has since had possession thereof.

On April 1, 1895, the plaintiff served notice on the defendant informing it of the suspension of Independence Lodge, that the bank book had been delivered over to the plaintiff, and that plaintiff owned the funds on deposit as aforesaid.

One Hirsch recovered a judgment for $69.72 against Independence Lodge, docketed it and issued an execution to the Sheriff. Supplementary proceedings were instituted, and on April 6 the assistant receiving teller of the defendant appeared and testified that Independence Lodge had on deposit to its credit $253.93. On April 10 a Judge of the Court of Com-

mon Pleas made an order directing the defendant to pay out of said moneys $103.21 to the sheriff on account of the execution and $30 costs in said action. The defendant complied with this order on the following day, and now claims that the payment made thereunder is binding on the plaintiff.

The plaintiff was not notified of said proceedings, and now sues to recover the entire deposit. The defendant demurs upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

*J. C. de la Mare*, for plaintiff.

*Hoyt & Schell*, for defendant.

McAdam, J.—Upon the conceded facts the moneys on deposit became the property of the plaintiff prior to April 1, 1895. The defendant was on that day sufficiently notified of the change of title, and, as a consequence, the payment on April 11, pursuant to the order made by the Common Pleas Judge, was in the defendant's own wrong and not chargeable to the plaintiff (Richardson *v.* Ainsworth, 20 *How. Pr.* 521; Muir *v.* Schenck, 3 *Hill*, at p. 232; Schrauth *v.* Bank, 86 *N. Y.* 390; Wright *v.* Cabot, 89 *N. Y.* 570; West Side Bank *v.* Pugsley, 47 *N. Y.* 368; Beebe *v.* Goodenough, 3 *Hun*, 73; Roy *v.* Baucus, 43 *Barb.* 310).

The order taken by the judgment creditor should have been in the language of section 2446 of the Code, "permitting" the defendant to pay to the Sheriff; it can have no greater effect. The defendant might then have availed itself of the option, and, by declining, put the creditor to his remedy by action.

Section 2447 which authorizes a "direction" to pay, applies only to moneys in the hands of the judg-

ment debtor. The provision therein directing delivery over by a third person applies to articles of personal property other than money, capable of delivery, and to which the title of the debtor is undisputed.*

If the defendant had called the attention of the Judge who made the order to the fact that the plaintiff had possession of the bank book and claimed the deposit, he would no doubt have modified it by making the order *permissive* instead of *mandatory*.

At all events the order furnishes no protection to the defendant, and the payment by it to the Sheriff must be considered as voluntarily made.

The fact that the notice did not specify in detail how the money on deposit became the property of the plaintiff is immaterial, for the rule is that where a party has notice sufficient to put him upon inquiry, he is chargeable with such knowledge as the inquiry would have disclosed if it had been properly made (Bienenstock *v.* Ammidown, 31 *Abb. N. C.* at p. 409).

It follows that the plaintiff is entitled to judgment on the demurrer, with costs.

* The power to order the delivery of property to the receiver is limited to personal property of the judgment debtor. (First Nat. Bank *v.* Martin, 49 *Hun*, 571.)

The proceeding is limited to reaching property of the debtor, in his possession or in the possession of others, conceded to be his. (Stewart *v.* Foster, 1 *Hilt.* 505. See also Wright *v.* Cabot, 89 *N. Y.* 570).

TIMOTHY J. KIELEY, PLAINTIFF-RESPONDENT, *v.* THE CENTRAL COMPLETE COMBUSTION MANUFACTURING CO., DEFENDANT-APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, JUNE, 1895.

§§ 432, 636, 638.

*Attachment against foreign corporation—sufficient service of summons.*

Where an attachment has been levied upon property belonging to a foreign corporation, and the corporation has filed the designation required by law of a person upon whom process against it should be served, but such person cannot be found within the state; and the summons, complaint, affidavit and undertaking have been delivered to the custodian of the property attached, and by him delivered to the managing agent of the corporation. *Held*, that the delivery of these papers to him was a sufficient service of the summons upon the defendant within the prescribed time under section 638 of the Code of Civil Procedure, although not delivered with the intent to effect a service, and a motion to vacate the attachment on that ground will be denied.

Upon proof that one had been agent and had resigned as such, but still acted in some capacity for the defendant it is for the latter to show the precise nature and extent of his agency.

Putnam Co. Chemical Works *v.* Jochen, 8 *Civ. Pro. R.* 824, followed.

(*Decided June*, 1895.)

Appeal from order of Special Term of this Court denying defendant's motion to vacate an attachment on the ground of the failure of service of summons within thirty days after the issuing of the warrant.

*Chas. J. Hardy*, for plaintiff, respondent.

*Melville Egleston*, for defendant, appellant.

DALY, C. J.—This is an appeal from an order of the Special Term of this Court denying defendant's motion to vacate an attachment granted on November 14, 1894, against the defendant as a foreign corporation (*Code*, § 636).

The ground of the motion is that the plaintiff had not complied with the provisions requiring that, within thirty days after the granting of the attachment, defendant must be served with the summons personally, within or without the State, or by publication pursuant to an order therefor.

It appears that the defendant, as a foreign corporation, filed with the Secretary of State the designation required by law naming one Caleb R. Ayer as the person upon whom process against it should be served, but it also appears that such person was not to be found within the State. The attachment was levied upon moneys belonging to the company in the hands of one Rutzler, which moneys were claimed by one Caldwell; that he received from Rutzler the papers served upon and left with him by the Deputy Sheriff who levied the attachment; that Caldwell communicated the fact of the attachment and the action to the board of directors of the defendant corporation and advised them to take some action in the matter; that he called on plaintiff's attorney and suggested giving a bond for the release of the attachment; that he promised to aid in making service of process, and directed that nothing further be done until advised by him. During all this time Caldwell was the managing agent of the defendant.

The papers that Caldwell received from Rutzler, and which were left with the latter by the Deputy Sheriff, when he levied the attachment, were the summons and complaint in this action and the affi-

davit and undertaking upon attachment. The delivery of these papers to him was a sufficient service of the summons upon the defendant within the prescribed time. Service upon a foreign corporation may be made upon its managing agent (*Code*, § 432, *sub.* 3). It is contended that the service is not good because the papers were not delivered to Caldwell by Rutzler with intent to effect a service, and, after being taken away by Caldwell, were afterwards returned by him to Rutzler. But the delivery of papers to Caldwell, and the knowledge of the company of the action through his communication to the directors was sufficient service under the Code. The object of the summons is to advise the defendant of the commencement of the action, so that he may protect his rights, and the object was fully accomplished in this case (Putnam Co. Chemical Works *v.* Jochen, 8 *Civ. Pro. Reports*, 824, *General Term, First Dept*).

In this case the summons had been left by a deputy sheriff with a stranger, not on defendant's premises, but it reached the bookkeeper of defendant, and was delivered to the latter, who placed it in the hands of his attorney, and that was held to be sufficient service under section 638 of the Code. In this case the papers were left with the custodian of the property attached, who delivered them to the managing agent of the defendant, and the board of directors of the latter was notified and placed the matter in the hands of its attorney. The cases are very much alike, and the reasoning of the decision is clearly applicable. In the case cited, as in this, there were facts and circumstances which warrant the impression that the course of events was watched and interrupted with a view to defeat the plaintiff's attachment, and in this case there is evidence of active means taken by Caldwell to effect that purpose.

The affidavits present a question of fact as to whether Caldwell was the general agent of the company, but the weight of evidence was with the plaintiff. It is conceded that he was the manager of the company up to April, 1894, and the burden was on defendant to show the termination of the relations. Upon proof that one had been agent and had resigned even, but still acted in some capacity for the defendant, it is for the latter to show the precise nature and extent of his agency, as it was obviously within its power to do so (Donadi *v.* N. Y. S. N. Co., 2 *E. D. S.* 519).*

It was shown by the evidence of a director of the defendant that from July, 1893, when Caldwell obtained the option to buy out the company, all business in New York that had been done by or for the company had been done by Caldwell, acting as manager and general agent; that he held himself out to be such manager and general agent, his name, with that designation, being stamped on the books of design and pamphlets of the company; and that his office in New York was the office of the company; and it was shown that he communicated with the company as to this attachment, and asked that some action should be taken; that he received orders for boilers for the company, and had submitted propositions in its name therefor, and all this had been up to and subsequent to the time of the attachment.

From the evidence it was manifest that although the company had a full board of officers and directors it had done no business for over a year and a half,

* If there is a doubt as to whether the functions of the person are such as to render service on him proper, the company must, on a motion to set aside a judgment, disclose his precise relations to them. (Donadi *v.* N. Y. State Mut. Ins. Co. 2 *E. D. S.* 519.)

unless the business done by Caldwell was the business of the company, and yet it was not contended that it had ceased to do business, although affidavits were made by its president and secretary and by Caldwell, and it is certain that Caldwell, with the knowledge of the directors, continued to hold himself out as manager and general agent.

It was to Caldwell's interest to have it appear that he was not doing business for the company, although styling himself its agent; for he claimed the moneys attached on the ground that by arrangement with the company they were to be collected by him, as the work for which they were intended as payment was sub-contracted by the defendant and he paid the cost thereof. Notwithstanding this claim he received an assignment from the company of such moneys after the attachment was levied.

Upon the evidence, therefore, it was satisfactorily established that Caldwell had the whole management and agency of any business to be done by the defendant company; that the summons and complaint were delivered to him within the thirty days prescribed by law, and the fact thereof communicated to the defendant, and that under the authorities the provisions as to services were satisfactorily complied with.

The order should be affirmed, with costs and disbursements.

BISCHOFF and GIEGERICH, JJ., concurred.

## SCHWARTZ *v.* SCOTT.

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW YORK COUNTY, AUGUST, 1895.

§ 3272.

*Security for costs—effect of laches in applying for order.*

Under section 3272 of the Code of Civil Procedure, the Court or Judge has the power to grant an order, without notice, requiring plaintiff to give security for costs.

Where, however, defendant delays applying for the order until after the answer has been served, he is deemed guilty of laches, and unless the delay in moving is excusable, the order will not be granted.

(*Decided August*, 1895.)

Motion to vacate order requiring plaintiff to give security for costs.

*Dunn & Delacy*, for plaintiff.

*Davies, Stone & Auerbach*, for defendant.

BEEKMAN, J.—An order having been made requiring plaintiff to give security for costs, I am now asked to vacate the same on the ground, first, that the order was irregularly granted in that it was made *ex parte*, and second, that the defendant was guilty of laches in not applying for the order until after he had served his answer. So far as the first ground of objection is concerned, it is clearly untenable. The Court or Judge has the power, under section 3272 of the Code of Civil Procedure, to make such an order without notice. This was clearly held in the case of Churchman *v.* Merritt (50 *Hun*, 270). In that case. while Mr. Justice

Daniels expressed the opinion that it was a "more judicious mode of proceeding" to apply for the order on notice, he also states that an absolute order in the first instance is not unauthorized. As to the other ground upon which the motion is made, I am of the opinion that the defendant forfeited his right to security for costs by delaying his application until after he had answered the complaint.* He knew, upon the service of the summons and complaint, that he was entitled to an order requiring security for costs to be given. The law requires that under such circumstances the application must be diligently made, and it has been held that such diligence has not been shown where it appears that the application is not made until after the answer has been served. The question seems to have come squarely before the General Term of this department in the case of Stevenson v. The New York, Lake Erie & Western Railroad

* The right to require security on the ground that plaintiff was at the time of the commencement of the action a non-resident is lost by failure to move therefor until after the service of an answer, unless it appears affirmatively from the motion papers that defendant did not learn of such non-residence until after answering. Stevenson v. N. Y., L. E. & W. R. R. Co., 14 *Civ. Pro. R.* 384.

A defendant entitled to security for costs may waive his right by laches in not moving with promptness; and for that reason, the court may, in a proper case, deny the application, but if the delay is excused, the court has the power, at any time before final judgment, to require plaintiff to file the security required by statute as a condition to the further prosecution of the action. Wood v. Blodgett, 15 *Civ. Pro. R.* 114.

It has been supposed that defendant may demand security at any time before judgment. Burgess v. Gregory, 1 *Edw.* 449; Abbott v. Smith, 8 *How. Pr.* 463; Butler v. Wood, 10 *How. Pr.* 318.

Security may be required at any time during the progress of the action, either before trial or pending appeal. It may be for costs already accrued or those thereafter accruing. Gedney v. Purdy, 47 *N. Y.* 676.

Company (49 *Hun*, 169), in which the order of the Court below is affirmed, which vacated an order made to file security for costs on the ground of the laches of the defendant, where such laches seem to have been mainly in failing to move before service of the answer. I am not to be understood as taking the position that the Court cannot require security for costs even after answer, in a case where the delay in moving was excusable. No facts, however, are presented upon this motion disclosing any reason whatsoever why the motion was not more promptly made. Under such circumstances, I think that the case fairly comes within the decision above stated. The defendant's counsel refers to the case of Robertson *v.* Barnum (29 *Hun*, 657), where the General Term of this Court, in the Second Department, sustained an order requiring security for costs, although the defendant had not applied for such order until after serving his answer. Without undertaking to hold that the two cases may not be reconciled, it is sufficient to say that the case of Stevenson *v.* The New York, Lake Erie & Western Railroad Company is a later determination of the Court, and one also which was made in this department; and if there is any inconsistency between the two cases, it should certainly be followed by me.

Motion granted, with $10 costs.

## JOHN BOWE *v.* VALENTINE BRUNNBAUER.

SUPERIOR COURT OF BUFFALO, GENERAL TERM, JULY, 1895.

§ 873.

*Physical examination of party before trial—order requiring plaintiff's attorney to produce plaintiff, of no effect.*

Under section 873 of the Code of Civil Procedure, providing that the court or judge may grant an order for the physical examination of a party before trial, there is no authority which authorizes the court to compel the attorney to produce the party.

Under section 873, no power is anywhere conferred upon the court to take the examination, but the order must direct that the party appear before the judge or a referee.

The statute requires that not more than 20 nor less than 5 days shall intervene between the granting of the order and the examination unless special circumstances be shown in the affidavit, and the fact recited in the order; and this requirement must be strictly followed, to justify an order for an examination on the day following the granting of the order.

The order must also direct the time of service of a copy thereof, and if this provision be not complied with, the order will be set aside.

(*Decided July*, 1895.)

Appeal by plaintiff from an order of the Special Term, directing plaintiff's attorney to produce him before the Court for a physical examination on the following day.

*Nelson T. Barrett*, for plaintiff and appellant.

*Harry L. Taylor*, for defendant and respondent.

HATCH, J.—By the proceeding instituted it is sought to procure an examination of plaintiff, and his

person, in order to enable defendant to properly frame his answer in the action. No point is made but that the moving papers are sufficient to accomplish the end sought, but it is earnestly insisted that the court is without power to make the order which it did make. In this regard we think the point is well taken and that the position must be sustained. The order was made on the 20th day of February, 1895, and directed that plaintiff's attorney produce plaintiff before the court, at Special Term, on the following day, at 10 o'clock in the forenoon, and that plaintiff then and there, before the court, submit to a physical examination, conducted by certain physicians named in the order, for the purpose of ascertaining the nature and extent of his personal injuries alleged, and also provided for plaintiff's examination as a witness, respecting the nature and extent of his injuries. The order is sought to be justified by section 873 of the Code of Civil Procedure. The section provides that the court or judge may grant the order, upon a proper application, and "the order must require the party or persons to be examined to appear before the judge, or before a referee named in the order, for the purpose of taking the examination at a time and place therein specified. The order must also direct the time of service of a copy thereof; which must be within the State, not more than twenty, nor less than five days before the time fixed for the examination, unless special circumstances, making a different time of service necessary, are shown in the affidavit, and that fact is recited in the order." The right to the order asked is a statutory right, and no other authority exists outside of the statute, for granting it. Consequently, authority must be there found for the order, or we are without power to support it. Heishon *v.*

Insurance Co., 77 *N. Y.* 275. Tested by this rule, the order is without basis in four particulars.

1. It commands the attorney to produce the party for examination. There is no authority in the statute which authorizes the court to compel the attorney to produce the party. The statute is that the party must be required to appear. And we know of no power existing in the court, in a case like this, aside from the statute, which empowers the court to lay such a command upon the attorney. There must be some process to compel the attendance of a party against his will. But this order lays the command upon the attorney, and furnishes him with no process to compel its execution. The attorney is not the party, and he has no authority to compel the party to obey the order. In this respect, therefore, the order must fail.

2. The attorney is directed to produce the party before the court at Special Term. There is no warrant for this. The statute requires that the court or judge may make the order, but the order is to be that he appear before the judge or a referee. We look in vain for authority to compel or direct his appearance before the court. The language of the case above cited is, "no power is anywhere conferred upon the court to order the examination or to take it." By amendment the power is now vested in the court to order the examination, but no power is anywhere expressed that it may take it. On the contrary, the express language is otherwise.

3. The order requires that the party be produced on the day following the order. The statute requires that not more than twenty nor less than five days shall intervene between the granting of the order and the examination, unless special circumstances be shown in the affidavit, and the fact recited in the

order. This requirement is essential, and must be followed. Balcom *v.* Adams (*Sup.*) 2 *N. Y. Supp.* 255. Nothing is stated in the moving papers showing necessity for a shorter time than the statute provides. A statement is made showing reasons why an order to show cause is necessary on less than eight days' notice, but it is not claimed that this relates to the examination. No recital whatever is made in the order relating to the matter, nor is it otherwise indicated that a shorter time than the statute requires is needed.

4. The statute also requires that the order must direct the time of service of a copy thereof. There is no attempt whatever at compliance with this provision. The result is that the order shall be reversed and set aside, with $10 costs and disbursements.

---

## ESTATE OF MARY J. HAVEMEYER.

SURROGATE'S COURT, NEW YORK COUNTY, AUGUST, 1895.

§§ 1022, 2546.

*Findings—must be passed upon by referee appointed by surrogate's court.*

Section 1022 of the Code of Civil Procedure, as amended, providing that the court or referee, upon the trial of the whole issues of fact, may file a decision stating concisely the grounds upon which such issues have been decided and direct the judgment to be entered thereon, has no reference to the surrogate's court or referees appointed thereby.

A referee appointed by the surrogate to examine the accounts of an executor must under sections 2545, 2546 of the Code state separately in his decision, the facts found and the conclusions of law.

(*Decided August*, 1895.)

Motion for an order sending back the report of referee for correction and directing him to state separately therein his findings of fact and conclusions of law.

*Butler, Stillman & Hubbard,* for executor.

FITZGERALD, S.—A referee was appointed herein by the Surrogate, under section 2546 of the Code of Civil Procedure, to examine the accounts of the executors and to hear and determine all questions arising upon the settlement of said accounts which the Surrogate had power to determine. The referee filed his report and also three sets of proposed findings of fact and conclusions of law which had been passed upon by him upon their submission by the parties. The report or decision does not state separately the findings of fact and conclusions of law made by the referee, nor does it contain any of the proposed findings of fact and conclusions of law passed upon by him, although they were filed with it and the opinion of the referee in this office. This is a motion made by parties in interest for an order sending the report or decision back for correction and directing the referee to state therein separately the facts found and the conclusions of law, and also to embody and include therein all the findings of fact and conclusions of law heretofore found by him at the request of either or any of the parties herein. Section 1022, prior to its amendment by chapter 688 of the Laws of 1894, provided that the Court or referee in making a decision upon trial of the whole issue of fact must state separately the facts found and the conclusions of law. Section 2546, at the time of such amendment, declared, and it has never since been changed, that the provisions of the Code applicable to a reference by the Supreme Court, apply

to a reference by this Court, so far as they can be applied in substance without regard to the form of the proceeding. Section 1022, as amended, provides that the Court or referee upon the trial of the whole issues of fact may file a decision stating concisely the grounds upon which such issues have been decided and direct the judgment to be entered thereon. It is claimed that under sections 2546 and 1022, as amended, the referee herein is not required to make findings of fact and conclusions of law. The claim I think is untenable. Section 2545 requires the Surrogate, upon the trial of an issue of fact, to file in his office his decision in writing, which must state separately the facts found and the conclusions of law.* It would be highly improbable to suppose that the Legislature, by the amendment mentioned, intended to create the anomalous condition of relieving referees appointed

* The only requests to find which a surrogate is bound to regard are those provided for in section 2545. Other requests may be submitted and considered, but are not required by statute, nor necessary to protect the rights of a party. Hartwell *v.* McMaster, 4 *Redf.* 389.

Those provisions point out the practice to be followed with care and precision. The surrogate is required to file in his office his decision stating separately the facts found, and the conclusions of law. Either party may except to the findings of fact or of law, and upon the settlement of the case may request findings, and take exceptions to a refusal, and the appeal brings up for review in the appellate court any question of fact or law thus raised by exceptions taken. The purpose was to assimilate the practice upon appeals from a surrogate's decree in the prescribed cases to that which regulated appeals from a judgment rendered by the court or a referee, and to substitute a system which would point out specific errors and evolve the exact questions intended to be reviewed. Angevine *v.* Jackson, 108 *N. Y.* 470.

It is error for a referee appointed by a surrogate, in an accounting by an executor, to refuse to act on requests to find facts. Matter of Mellen, 31 *St. Rep.* 770. See also Matter of Hicks, 14 *St. Rep.* 320. But see, Matter of Niles, 47 *Hun*, 348.

by this Court from making the findings which are exacted from the Court itself. The purpose was, no doubt, to simplify and improve the practice for the benefit of the Courts mentioned in section 1022, as well as for the benefit of referees appointed by such Courts, and these Courts are indicated by section 3347, subdivision 7, of the Code. I think the application of the amendment is confined to these last mentioned Courts, and has no reference to this Court or its referees. The referee should also embody in his decision all the findings of fact and conclusions of law found by him at the request of any of the parties (Nobis *v.* Pollock, 6 *N. Y. Supp.* 273; Schultheis *v.* McInerny, 13 *N. Y. Supp.* 684).

Application granted.

---

## EDWARD BARBIG *v.* LOUISA P. KICK AND ANO.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, SEPTEMBER, 1895.

§ 1630.

*Mechanic's lien—foreclosure—remedy at law, once begun, must be exhausted first.*

The remedies by action for the debt secured by a mechanic's lien, and foreclosure of the lien are cumulative and concurrent, and the creditor may pursue both until he obtains satisfaction.

Under laws 1885, ch. 342, section 8, providing that "the manner and form of instituting and prosecuting an action for the foreclosure of a mechanic's lien shall be the same as in actions for the foreclosure of mortgages upon real property," taken in conjunction with section 1630 of the Code of Civil Procedure, providing that an action to foreclose a mortgage "shall not be commenced or maintained," until the return of execution unsatisfied.

*Held*, that an action at law, once begun, to enforce the debt secured by a mechanic's lien must be carried through to completion, and the legal remedy exhausted, before the lienor can have recourse to the equitable remedy of foreclosure; and the complaint in foreclosure which does not allege the issue and return of execution unsatisfied is demurrable.

(*Decided September*, 1895.)

Demurrer to complaint in action for the foreclosure of a mechanic's lien.

*John Mulholland*, for plaintiff.

*George Haas*, for defendant.

PRYOR, J. — Action by sub-contractors against owner and contractor for foreclosure of a mechanic's lien. Demurrer by contractor-defendant. The complaint shows a judgment against the contractor-defendant for the debt secured by the lien, but omits to allege issue or return of execution. This defect the demurrer affirms to be fatal to the defense. Upon principle the lien is a security for the debt, and a judgment for the debt is no bar to the enforcement of the security. The remedies by action for the debt and foreclosure of the lien are cumulative and concurrent and the creditor may pursue both until he obtains satisfaction (Pollock *v.* Ehle, 2 *E. D. Smith*, 541; Hall *v.* Pettigrove, 10 *Hun*, 609). The plaintiff concedes the law to be so if not changed by statute but he contends that by section 8, chap. 342, Laws of 1885, the return of the execution unsatisfied is an indispensable condition to the maintenance of the action to foreclose the lien. The section provides that "the manner and form of instituting and prosecuting any such action * * * shall be the same as in actions for the foreclosure of mortgages upon real property." By section 1630 of the Code, an

action to foreclose such mortgage "shall not be commenced or maintained" until the return of execution unsatisfied. The precise point for adjudication is, does the act of 1885, in conjunction with section 1630 of the Code, preclude enforcement of the lien until issue and return of execution? In the foreclosure of a mortgage the complaint must state whether any other action has been brought to recover any part of the mortgage debt (Code, § 1629), and if in such action judgment has gone for the plaintiff, he cannot commence or maintain an action to foreclose the lien until the issue and return of execution (sec. 1630.) If then the procedure in an action to foreclose a lien is to be identical with the procedure in an action to foreclose a mortgage, the issuance and return of an execution is as indispensable in the former as in the latter action. And if the fact of such issuance and return be an essential constituent in the cause of action, an elementary rule of pleading requires its allegation in the complaint. Were the effect of the provisions of the Code to deprive the mortgagee of his right to foreclosure, they would not be a mere regulation of procedure; and so, since the act of 1885 only assimilates the two actions in procedure, section 1630 might not apply in an action upon the lien. As, however, the right to sue is not abolished, but only suspended until the return of execution, the provision is plainly a rule of procedure. The lienor may maintain an action at law for the debt, but if he chooses to pursue the legal remedy he must exhaust it before recourse to equitable relief. The equity of the rule is illustrated in the present case. The plaintiff has recovered a judgment for the debt against his contractor, but without an attempt to coerce payment from the real debtor, he seeks satisfaction out of the

property of one standing substantially in the situation of a surety. Upon another ground, too, it is apparent that as against the contractor, the complaint propounds no cause of action. There is no lien upon his property to be foreclosed, nor can there be a recovery against him for the debt because it is already merged in judgment.

Against him, therefore, the complaint exhibits no right to relief.

Demurrer sustained, with leave to amend on payment of taxable costs.

---

## LEWIS *v.* COOK, *et al.*

SUPREME COURT, GENERAL TERM, SECOND DEPARTMENT, JULY, 1895.

§ 2653 A.

*Action to determine the validity of the probate of a will—when it may be commenced.*

Under section 2653 A of the Code of Civil Procedure, providing that "any person interested in a will or codicil admitted to probate in this State" may cause the validity of the probate thereof to be determined in an action in the Supreme Court, at any time within two years from the date of the decree; said period of two years begins to run from the date of the last decree if the first decree has been reversed and the will subsequently again admitted to probate.

*Decided July*, 1895.)

Appeal from judgment of Special Term, Suffolk Co., sustaining plaintiff's demurrer to the first defense set forth in defendant's answer.

*Wilmot M. Smith*, for plaintiff-respondent.

*Thomas Young*, for defendants-appellants.

DYKMAN, J.—This is an appeal from an interlocutory judgment sustaining the demurrer interposed by the plaintiff to the first defense set forth in the amended answer of the defendant. The action was brought to determine the validity of the probate of a will of Mary Snelling, deceased, under section 2653 A of the Code of Civil Procedure. For a first defense the defendants set up in their answer that the action was not commenced within the time prescribed by the section of the Code to which reference has been made; second, that the section has no application to personal property; third, that the section is not applicable to this action, because the testator died before its passage. The plaintiff demurred to that defense on the ground that it was insufficient in law upon its face. The issue of law was tried at Special Term, and judgment was rendered for the plaintiff, sustaining the demurrer, and from that judgment the defendants appealed.

The case is under the control of the first part of section 2653 A which reads as follows:

"Any person interested in a will or codicil admitted to probate in this state as provided by the Code of Civil Procedure, may cause the validity of the probate thereof to be determined in an action in the Supreme Court for the county in which said proof was had."

The section requires that the action should be commenced within two years after the will has been admitted to probate. In this case the will was first admitted to probate July 27, 1891; but before two years from that date, and on January 17, 1893, the probate was reversed by the Court of Appeals, 32 *N.*

*E.* 1006. Before two years had expired after the first probate of the will, the plaintiff was prevented from bringing this action by the judgment of the courts. By that judgment the original status was restored and the parties were placed in the same condition as they were before the first probate of the will. They had the same rights before the Surrogate, and the same right to attack the will under section 2653 A of the Code, within two years from his second decision admitting the will to probate, which was October 9, 1893. This action was commenced June 1, 1894, within less than one year from the time the will was finally admitted to probate. It appears, therefore, that under a proper construction of the statute this action was commenced within the time prescribed by the section quoted. It is also contended by the defendants that the section in question has no application to personal property, but the contention is erroneous, for the language is general, and applies to all wills and codicils, whether of real or personal property. It is also contended that the section does not apply to this case because the testator died before the section was enacted, which was in 1893; but we agree with the conclusion of the trial judge that the section applies to wills which were proved after the passage of the act. The statute constituted a change in the mode of procedure which is not violative of any vested rights.

Judgment should be affirmed with costs.

BROWN, P. J., and PRATT, J., concur.

## KINGSTON CARRIAGE CO. *v.* HUTTON.

ULSTER COUNTY COURT, JULY, 1895.

§ 1776.

***Action by or against a corporation—when its existence need not be proved on the trial.***

**In an action by or against a corporation, it is not necessary to prove on the trial of the cause the existence of the corporation, unless the answer is verified and contains an affirmative allegation of its non-existence; and this rule applies where the defendant does not appear or plead.**

(*Decided July*, 1895).

Appeal by defendant from judgment of justice's court.

*Brinnier & Newcomb*, for appellant.

*Everett Fowler*, for respondent.

CLEARWATER, J.—The plaintiff brought suit in the court below, alleging in writing that it was a domestic corporation. The defendant did not appear or plead. The plaintiff's manager testified it was incorporated, and proved its claim against the defendant, for which judgment was rendered; from which judgment the defendant now appeals claiming that it should be reversed, because, he having failed to appear or plead, the law imposed upon the plaintiff the burden of proving every fact, evidence of which was necessary to justify the entry of judgment by the best obtainable proof, and that oral testimony as to the plaintiff's incorporation was incompetent and secondary.

Without discussing the question whether this tes-

timony was secondary, of which I am not convinced, the claim of the defendant is untenable because of his entire failure to place himself in a position to raise the question. The Revised Statutes provided that, in suits brought by or against a domestic corporation created by or under any statute of this state, it shall not be necessary to prove on the trial of the cause the existence of such corporation unless the defendant shall have alleged in the answer in the action that the plaintiffs are not a corporation. 2 *Rev. St.* p. 458, § 3. By chapter 422 of the Laws of 1864, this provision was extended to all corporations, foreign or domestic, and when the additional chapters of the Code were adopted was embodied in it. *Code Civ. Pro.* § 1776. The rule is a familiar one and has repeatedly been stated. *In re* New York, L. & W. Ry. Co., 99 *N. Y.* 12, 1 *N. E.* 27; Association *v.* Reed, 93 *N. Y.* 474; Manufacturing Co. *v.* Trowbridge, 68 *Hun*, 28, 23 *N. Y. Supp.* 674; Vulcan *v.* Myers, 58 *Hun*, 161, 11 *N. Y. Supp.* 663; Bengston *v.* Steamship Co. 31 *Hun*, 96.

Further discussion is useless, and the judgment must be affirmed, with costs.

## HAMILTON v. GORMAN.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, SEPTEMBER, 1895.

§§ 578, 587, 595, 596, 757.

***When sheriff liable as bail—action therefor does not abate on death of sheriff.***

**Where the sheriff has neglected to require the justification of sureties upon a bail bond given upon the issuance of an order of arrest, the sheriff himself is liable as bail.**

**An action against the sheriff to enforce his liability as bail under section 587 of the Code of Civil Procedure does not abate on the death of the defendant, but may be continued against his personal representatives.**

(*Decided September*, 1895.)

Motion for order continuing an action against the personal representatives of deceased sheriff.

*Charles C. Sanders*, for the motion.

*Archibald C. Shenstone*, opposed.

GIEGERICH, J.—This action was brought against the defendant upon his liability as bail, such liability arising from his failure to require the justification of sureties upon a bail bond given upon the issuance of an order of arrest in an action brought by plaintiff against one Salvador Parnella for personal injuries. In that action the plaintiff obtained judgment, and after the return of execution unsatisfied and due demand made upon this defendant this suit was instituted. Defendant having died pending the time for service of his answer, this motion is made and I am

constrained to grant it. Unless the cause of action is one which abates by the death of the defendant the Court is bound to make an order such as is here sought (*Code Civ. Pro.* § 757; Cort *v.* Campbell, 82 *N. Y.* 509). Under the state of facts disclosed by the complaint the sheriff is liable as bail (*Code Civ. Pro.*, §§ 578, 587); his position is in all ways assimilated to that of bail (*id.* § 595), and his liability is to be enforced only by action (*id.* § 596). No argument is required to demonstrate that the liability of bail is contractual, and that the personal representatives stand in the place of deceased bail was recognized in Meddowcroft *v.* Sutton (1 *Bos. & Pull.* 61). The fact that the action in which the order of arrest was obtained was of a personal nature does not affect the liability of this defendant, which is predicated upon the judgment entered in that action, the rights and remedies under which are not affected by the abatable nature of the cause of action itself (Wood *v.* Phillips, 11 *Abb. N. S.* 1; Carr *v.* Rischer, 119 *N. Y.* 117).

Motion granted, with $10 costs to the plaintiff to abide the event.

---

## *In re* GREGORY'S ESTATE.

SURROGATE'S COURT, OTSEGO COUNTY, JUNE, 1895.

§§ 2517, 2528, 2532.

*Probate of will—waiver of citation does not confer jurisdiction.*

Proof of service of a citation must be made in the manner prescribed by law for proof of service of a summons issued out of the Supreme Court, or proof of service must be made by affidavit, or, where the person served is of full age, and not incompetent, by a written admission signed by him, accompanied with proof by affidavit or otherwise of the genuineness of his signature.

**In a proceeding for the probate of a will, a waiver of service of the citation signed by all the necessary parties thereto, does not confer jurisdiction upon the court to entertain the proceeding. There are express statutory provisions regulating the probate of a will and a party can not waive these as he can his ordinary rights.**

**The father of an illegitimate child may legally adopt such child, although the fact of such illegitimacy does not appear in the adoption papers.**

(*Decided June*, 1895.)

Proceeding to vacate a decree admitting will to probate.

The facts are stated in the opinion.

*Charles T. Brewer*, special guardian and attorney for petitioner.

*D. P. Loomis*, for the respondent.

ARNOLD, S.—This is a proceeding to open, vacate, and set aside a decree of the Otsego County Surrogate's Court entered October 16, 1894, admitting to probate as the last will and testament of Nelson B. Gregory, deceased, a paper writing, dated June 27, 1889, on the ground that the only heir at law and next of kin of said Nelson B. Gregory, deceased, was not cited in the proceedings for probate. Nelson B. Gregory was never married. For a number of years he lived in France. While a resident of France he lived and cohabited with a woman by whom he had six children, among them the petitioner in this proceeding. About 1878 he returned to the United States, and became a resident of the town of Unadilla, County of Otsego, N. Y., of which place he remained a resident down to the time of his death. The petitioner herein claims to be the legally adopted daughter of said Nelson B. Gregory, and as such adopted daughter, that she is his only heir-at-law and next of kin. Respondents

claim that she was never legally adopted. They base this claim on the fact that it does not appear in the adoption papers that said Jeanne Marie Nellie Genin Gregory was the illegitimate child of said Nelson B. Gregory. I do not think the point is well taken. Nelson B. Gregory was the natural father of the child he was seeking to adopt. He was never married. Jeanne Marie Genin was the mother of the child. She resided in Lyons, France. The mother was never married. The child was illegitimate, and upwards of the age of 12 years. She had no general guardian, and was living with said Nelson B. Gregory at the time of the adoption. All that was necessary for adoption, under these circumstances, was (1) the consent of the child; (2) the consent of the mother, signed, duly acknowledged, and certified in the manner required for conveyance of real estate to entitle it to record; (3) the appearance of Nelson B. Gregory and the child before the county judge of Otsego county for the execution of the agreement to adopt, and for the examination of the said Nelson B. Gregory and the child separately; (4) if satisfied that the moral and temporal interests of the child would be promoted by adoption, the making of the order by the county judge, directing that said child should thenceforth be treated and regarded in all respects as the child of said Nelson B. Gregory. All of this was duly done, and on his examination said Nelson B. Gregory stated that this child was his natural daughter. It was not necessary that it should appear upon the face of the adoption papers that she was an illegitimate child. I take it that all of these requirements of the statute were intended for the protection of the child and of the persons sustaining to the child the legal relations of parent, guardian, or protector.

In this proceeding it is the duty of the court to place the petitioner in the same position, and give her the same rights, as those to which she was entitled before the petition for the probate of this alleged last will and testament was presented to the court. At the time the petition for probate was presented, the petitioner had full knowledge of the adoption proceedings, and it was his duty and the duty of the attorney who prepared the petition, and who also had knowledge of the facts, to have set forth in the petition that this child was alleged to be the adopted daughter of the decedent. They had no right to pass upon these adoption papers judicially, and hold for the purpose of subserving their own ends, that she was not a legally adopted child, and was, therefore, not entitled to be cited in the proceedings for the probate of the alleged will. That was a matter for the court to determine in a proper proceeding. The statute relating to the adoption of children provides that the child, when adopted, shall take the name of the person adopting and the two thenceforth shall sustain towards each other the relation of parent and child, and have all the rights, and be subject to all the duties, of that relation. Laws 1887, c. 703, § 10. The Code of Civil Procedure provides that upon the presentation of the petition for the probate of a will the surrogate must issue a citation, if the will relates to both real and personal property, to the husband or wife, if any, and to the heirs and all the next of kin of the testator. At the time this petition was presented to the surrogate this child was, apparently, the only heir-at-law and next of kin of the testator, and the only person required under the Code to be cited in that proceeding. While she may not have any rights in the property of the testator, she is entitled to her day in court for the

purpose of cross-examining the subscribing witnesses to the will, and for the purpose of having her rights judicially determined.

It is further claimed by the respondents that, if this decree is to be opened, it should be opened only as to the petitioner, and should stand so far as it relates to the other parties, and that the letters issued on said will should remain in full force and effect, pending further proceedings. The petition for the probate of the will named the brothers and sisters and some nephews and nieces as the only heirs at law and next of kin of the decedent. A citation was issued thereupon to these persons, but this citation was never served. Before the return day thereof the petitioner appeared in surrogate's court with written waivers from all persons named in the citation, whereby they waived the issuance and source of a citation, and whereby they attempted personally to appear in the surrogate's court, and consented that said will be admitted to probate, and letters issued thereon without further notice to them. Four of the persons executing these waivers were non-residents. If the view taken above is correct, none of them were necessary parties in proceedings to probate the will, and the decree should be wholly set aside. But, supposing them to be necessary parties should the decree as to then be allowed to stand? Section 2516 of the Code of Civil Procedure provides:

"Except in a case where it is otherwise specially prescribed by law, a special proceeding in a surrogate's court must be commenced by the service of a citation issued upon the presentation of a petition."

Section 2614 provides that:

"A person designated in a will as executor, devisee or legatee, or any other person interested in the

estate, or a creditor of the decedent, may present to the surrogate's court having jurisdiction a written petition, duly verified, describing the will setting forth the facts upon which the jurisdiction of the court to grant probate depends, and praying that the will may be proved, and that the persons specified in the next section may be cited to attend the probate thereof. Upon the presentation of such a petition the surrogate must issue a citation accordingly."

Section 2615 provides that:

"The following persons must be cited upon a petition presented as prescribed in the last section: (1) If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator; (2) if the will relates exclusively to personal property; the husband or wife if any, and all the next of kin of the testator; (3) if the will relates to both real and personal property, the husband or wife, if any and all the heirs and next of kin of the testator."

Section 2517 provides that:

"The presentation of a petition is deemed the commencement of a special proceeding within the meaning of any provision of this act which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section a citation issued upon the presentation of the petition must, within sixty days thereafter be served as prescribed in section two thousand five hundred and twenty of this act."

Section 2520 provides how a citation must be served within the state, and it also provides that, in case the person to be served is an adult, and is not incompetent, he may assent in writing to the service within a shorter time than that fixed by the section. Sections 2522, 2524 and 2525 provide for service with-

out the state. Section 2528 provides that the appearance of a party against whom a citation has been issued has the same effect as the appearance of a party in an action brought in the Supreme Court. Section 2532 provides how proof of a citation may be made. It must be made in the manner prescribed by law for proof of service of a summons issued out of the Supreme Court, or proof of service must be made by affidavit, or, where the person served is of full age and not incompetent, by a written admission signed by him accompanied with proof by affidavit or otherwise of the genuineness of his signature. These are the steps necessary to be taken in order for the Surrogate to acquire jurisdiction of the persons of the necessary parties to the proceeding. In proceedings for probate it is nowhere "otherwise specially prescribed by law" that the Surrogate may obtain jurisdiction in any other way. There are certain proceedings in the Surrogate's court in which other methods are especially prescribed by law. For instance, in proceedings for administration. And although, prior to January 1, 1895, it had always been the practice in this county to accept these waivers in lieu of the issuance and service of citation, I think the practice was wholly unwarranted. In proceedings affecting the title to real estate I think the practice was dangerous. While a party has the undoubted right to waive any of his rights, there is a broad distinction, it seems to me, between his power to waive his rights and his power to waive the express provisions of a statute as to how a court shall obtain jurisdiction of a proceeding and of the persons of necessary parties thereto.

It follows from these views that the decree theretofore entered on the 16th day of October, 1894, admitting to probate the paper writing purporting to

be the last will and testament of Nelson B. Gregory, should be opened, vacated and set aside. Decreed accordingly.

---

## *In re* HUNTLEY.

SURROGATE'S COURT, RENSSELAER COUNTY, JUNE, 1895.

§§ 2472 subd. 3, 2730.

*On executor's accounting—expenses incurred in unwise litigation will not be allowed.*

Those "actual and necessary expenses" for which an executor must be reimbursed are those which are contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. It is well settled that the reasonable and necessary expenses of the burial of a decedent are a charge against his estate, although the executor is primarily liable as an individual, and not in his representative character. He must decide upon the amount to be expended, and pay it, and such sum will, if proper in amount, be allowed him on the final settlement of his accounts.

Under section 2730 of the Code of Civil Procedure providing for the allowance to executors of such "necessary expenses actually paid by them as appears just and reasonable," an executor though acting with honest intent and relying on advice of able and experienced counsel and believing that he was proceeding within the lines of his powers and duty, will not be reimbursed for expenses incurred in appealing from the decision of a referee of experience and ability, where half a dozen witnesses testified to the value of the services rendered and the material furnished, and the referee found that the amount charged and expended was reasonable and in accordance with the rank and circumstances of the deceased and also found as a conclusion of law (about which there could be no question) that the executor was primarily liable for the funeral expenses ordered.

**In case of doubt, it is the right if not the duty, of the executor or trustee to seek instruction from the court as to his duty in the premises.**

(*Decided June*, 1895.)

Judicial settlement of the accounts of Israel Huntley as executor of Roxana Duell, deceased.

The facts are stated in the opinion.

*McClellan & Albertson*, for the executor.

*John E. Hoag* and *John T. Norton*, for creditors, opposed.

LANSING, S.—The executor filed his account, duly verified. The creditors filed objections to certain items of credit for costs and disbursements alleged to have been paid by the executor in litigating the bill of the undertaker for the funeral expenses of the deceased. The creditors insist that such payments were unjustifiable, that the expenditure of nearly one-half of the small estate of about $800 in fruitless litigation over the undertaker's bill was unwarranted in law, and amounted to a breach of duty on the part of the executor, and that credit should not be allowed him therefor. On the other hand, the executor contends that he acted in entire good faith and under the advice of counsel in conducting the litigation and making the expenditures, and that he should be credited with the amount so paid by him.

The question presents some embarrassing features. The office of an executor or administrator is a position of responsibility, and its duties are often delicate and exacting. Such positions are rarely sought, especially where the estates are small, and in such cases the

compensation is usually very inadequate for the responsibility assumed and labor performed. The law is, therefore, indulgent where it appears that the trustee has been prompted by proper motives and has exercised reasonable judgment. On the other hand, the law condemns every act savoring of dishonesty or negligence in the administration of the trust whereby loss is suffered. But honesty, good intentions, and even advice of counsel, are not always sufficient, where loss has occurred to the estate through mismanagement. The law in addition requires that persons who accept such positions must, in the performance of their duties, be held to exercise a reasonable measure of intelligence, and such ordinary discretion and judgment as men usually exercise in the management of their own affairs. The expenditures in question, if allowed, must be allowed under section 2730 of the Code of Civil Procedure, as amended in 1893, which provides that executors and administrators may be reimbursed out of their estates for such "actual necessary expenses" incurred by them as "appears just and reasonable." This provision, though recently embodied in the Code, has long been a well-settled rule in equity. Young *v.* Brush, 28 *N. Y.* 667, 673. It also existed in a statutory form for many years prior to its re-enactment in the Code. 2 *Rev. St.* 93, § 58, as amended by Laws 1863, c. 362. The application of this provision to expenditures by executors and trustees for legal services is I think well stated in the case of St. John *v.* McKee, 2 *Dem. Sur.* 236. Rollins, S., says:

"The bare fact that an executor has actually expended for legal services the sum for which he asks to be reimbursed does not, of itself, entitle him to reimbursement, nor, indeed, does he become entitled

simply by showing, in addition, that he has acted honestly and in good faith. If objection is interposed it must also be made to appear that when the services were rendered they were demanded or seemed to be demanded by the best interests of the estate."

The case of O'Connor *v.* Gifford, 117 *N. Y.* 278, 22 *N. E.* 1036, cited by the counsel for the executor in support of his contention, is a case where an executor was sought to be charged on account of his failure to collect alleged collectible assets of his estate. It must be conceded that the rule of duty and diligence imposed upon an executor or administrator is the same whether a claim is prosecuted or defended, and that the rule laid down in that case should apply here. But I am sure the rule laid down in that case is not in conflict with the rule above stated. Peckham, J., in the case cited, states the rule as follows: "An executor who has acted in good faith, and intended fairly and fully to discharge his duty, will not be charged in this manner (as for *devastavit* for a failure to collect the money), if such intention has been directed by reasonable judgment"; and he quotes with approval the case of Schultz *v.* Pulver, 11 *Wend.* 363, a case where an executor was charged with misconduct in neglecting to take legal proceedings for the recovery of property, and the court by Nelson, J., say that "the executor must act in good faith and with reasonable judgment," to be exonerated from the charge. The result, upon reason and the authority, seems to be that those "actual and necessary expenses" for which an executor must be reimbursed are those which are contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. It is well settled that the reasonable and necessary expenses of the burial of a decedent are a charge against his

estate, although the executor is primarily liable as an individual, and not in his representative character. He must decide upon the amount to be expended, and pay it, and such sum will, if proper in amount, be allowed him on the final settlement of his accounts. Ferrin *v.* Myrick, 41 *N. Y.* 315; Patterson *v.* Patterson, 59 *N. Y.* 574.

This brings us to the real question in this case, which is, did the executor exercise reasonable judgment and discretion in entering upon the litigation, and incurring an expense of several hundred dollars in contesting the payment of the bill of the undertaker? The facts in the case are these: The undertaker presented a bill to the executor for $127 for funeral expenses. The bill appears to have been contracted by a Mrs. Vallee, who resided in the same house with the deceased and attended her during her illness, and who was a relative of the decedent's late husband. The executor learned of the order shortly after it was given. He lived about six miles from the deceased, and when he heard of her death which was telephoned him by Mrs. Vallee, he spoke to an undertaker residing near him in Sandlake to attend to the funeral, but when he learned on his arrival at the house of the deceased that Mrs. Vallee had gone to Troy to engage an undertaker and make arrangements for the funeral he countermanded his own order, and Mrs. Vallee contracted the bill in question. It further appears that Mrs. Vallee stipulated with the undertaker that she should not be personally charged with the bill, but the undertaker should look to the estate, and the executor had knowledge of this arrangement before the suit was brought. The entire estate consisted of $827 in money. The bill was presented to the executor, and payment was refused on the ground

—First, that it was excessive; second, that the services and material of the undertaker having been ordered by Mrs. Vallee, the undertaker must look to her for payment, and when paid the executor would be liable to her for the reasonable funeral expenses of his decedent. Suit was brought and the case was referred. The referee reported in favor of the plaintiff for the amount of the bill with interest. Judgment was entered thereon for damages $131.69, costs $188.69, amounting altogether to $320.38. An appeal was then taken by the executor to the General Term, where judgment was affirmed with costs. The entire expenditure by the executor in this litigation in excess of the claim of $127 is about $450, including $100 paid to his own counsel for his costs and services on the trial and on the appeal. Claims of creditors to the amount of about $500 have been admitted or established.

The defense that an action would not lie against the executor in the first instance, but should have been brought against Mrs. Vallee, was obviously untenable, since it appears that the executor impliedly authorized her to act for him by revoking his own order and accepting her services in the employment of the undertaker. Beyond that, it is a well-settled elementary principle that an executor is liable for reasonable funeral expenses of his decedent whoever may have ordered the same, whether with or without his knowledge or consent. *Redf. Law & Pr. Sur. Cts.* (5th Ed.) 438; Patterson *v.* Patterson, *supra*; Ferrin *v.* Myrick, *supra.*

This litigation had its origin in an idea which I think, obtains quite generally among executors and trustees, and perhaps to some extent in the legal profession, that an executor or trustee may safely litigate

any fairly controvertible question of law or fact arising in the course of administration, without the liability of having his action called in question, provided he acts in good faith and under the advice of counsel. I am satisfied this is not the law. It would be establishing a very dangerous precedent to hold that an executor could, on the plea of acting in good faith and under advice of counsel, fritter away an estate in litigation over claims of trifling amounts. A reasonable test in such case is, would the executor or trustee, in the management of his own affairs, under like circumstances, have incurred the expense in question? If not, then he certainly should not be credited with it in his account as executor or trustee. Besides, in cases of doubt, it is the right, if not the duty of the executor or trustee to seek instruction from the court as to his duty in the premises. *Code Civ. Pro.* § 2472, *sudb.* 3: *In re* Underhill, 117 *N. Y.* 471, 22 *N. E.* 1120. I am free to concede that the rule must not be drawn with too much strictness, but making the most ample allowance for honest intent and reliance on advice of able and experienced counsel, and the additional fact that the executor acted in the premises under the belief that he was proceeding within the lines of his powers and duty, yet it seems to me that when the matter was submitted to a referee of experience and ability, and half a dozen witnesses testified to the value of the services rendered and the material furnished, and the referee found that the amount charged and expended was reasonable and in accordance with the rank and circumstances of the deceased, and also found as a conclusion of law (about which there could be no question) that the executor was primarily liable for the funeral expenses ordered, then, at least, this litigation should have ended, and I

cannot conceive of any reasonable excuse for the expenditure of a large additional sum from the money of this estate in printing the case and taking an appeal to the General Term of the Supreme Court. The line must be drawn somewhere and perhaps for safe precedent it should exclude the expenditures of this entire litigation, and hereafter, in a like case, with the law touching the duties of an executor or trustee in the premises clearly defined the line will be so drawn. But in view of the hardship involved, the good faith of the executor, and the high character, learning and ability of counsel, I have, under all the circumstances, decided after considerable hesitation to allow the expense of the litigation in the Supreme Court. There was perhaps a slight question of fact as to whether the expense incurred was in accordance with the rank and circumstances of the deceased, also whether the undertaker had not charged in his bill for the casket more than the agreed price. When these questions were settled by a preponderance of evidence upon the reference there was not the slightest ground remaining for further litigation, and I must therefore strike from the executor's account all expenditures in excess of the damages, costs and disbursements included in the judgment entered upon the reference in the Supreme Court, and the disbursements of the executor for the services of his attorney in attending upon the reference.

Decreed accordingly.

## ROBERT GOELET *et al.* *v.* FRANK N. ROE *et al.*

N. Y. Court of Common Pleas, General Term, August, 1895.

§ 2235.

***Summary proceedings—landlord may remove sub-lessee after expiration of lease to lessee.***

**Under section 2235 of the Code of Civil Procedure, authorizing the "landlord or lessor of the demised premises" to maintain proceedings for removal of the persons in possession after expiration of the term, the landlord may, after the expiration of the term, maintain summary proceedings against one holding as sub-lessee under a covenant of removal from the landlord's lessee.**

**(*Decided August*, 1895.)**

Summary proceedings for possession of premises. Appeal from Sixth District Court.

*George D. De Witt*, for appellants.

*P. C. Talman*, for respondents.

Bischoff, J.—The unchallenged facts are that on October 16, 1893, the petitioners let the premises 402 Fourth avenue, in the City of New York, to Frederick N. Roe for one year from May 1, 1894, without provision of any kind for a renewal of the lease; that Frederick N. Roe thereupon sublet the premises to the respondent Mary R. Yost for the same period, and covenanted to renew the lease for one year from the expiration of the first; and that in September, 1894, the petitioners let the premises to Adeline V. Roe, the wife of Frederick N. Roe, for one year, commencing May 1, 1895. These proceedings for the removal of Frederick N. Roe, and all persons in pos-

session of the premises claiming under him, were instituted by the petitioners on May 3, 1895, three days after their lease to the said Frederick N. Roe had expired. Only the sub-lessee Yost defended, denying the petitioners' right to possession, and asserting that the lease to Mrs. Roe was in furtherance of a corrupt understanding between the petitioners, or their agent, and Mr. and Mrs. Roe, to prevent the enforcement of Mr. Roe's covenant of renewal. An attempt was made upon the trial to substantiate the fact of such a conspiracy, but the Justice below directed a verdict for the sub-lessee, and thereupon made a final order in her favor upon the specific ground that the petitioners had, by their lease to Mrs. Roe, parted with the right to immediate possession of the premises upon the expiration of the lease to Mr. Roe, and that they could not, therefore, maintain the proceedings. No point was made upon this appeal, for the respondent, with regard to her attempted defense of a conspiracy. Indeed, we are at a loss to understand the theory underlying the defense, or the principle of law which it aimed to invoke. The petitioners could not in any wise be affected by Frederick N. Roe's covenant of renewal. Neither could their right to refuse his further tenancy, and to accept other tenants in his stead, be thereby impaired, even assuming that the design of the lease to Mrs. Roe was as claimed by the respondent. Possibly, if it appears that the husband is the real party in interest under the lease to the wife, a Court of equity would grant relief as against them in the appropriate action. Mitchell *v.* Reed, 61 *N. Y.* 123; Hackett *v.* Patterson, *Com. Pl. N. Y.*, 16 *N. Y. Supp.* 170.

It is clear beyond controversy, however, that the Justice's ruling that the proceedings were not maintainable by the petitioners was error. Their right to institute and maintain the proceedings existed by force of the statute for such cases made and provided. Section 2235 of

the Code of Civil Procedure in express terms authorizes the "landlord or lessor of the demised premises" to maintain proceedings for removal of the persons in possession after expiration of the term; and in Imbert *v.* Hallock (23 *How. Pr.* 456), it was specifically ruled by the General Term of this Court that the landlord or lessor was not disabled from maintaining the proceedings because he had given a lease to a third person, to commence at once upon the expiration of the lease of the person in possession. The case relied upon by the Justice below (Insurance Co. *v.* Scott, 2 *Hilt.* 550) clearly is not to the contrary. No more was there held than that the landlord does not impliedly covenant to protect his tenant against the intrusion of third persons, and that he is not bound to secure their removal. So in People *v.* Andrews, 52 *N. Y.* 445, cited by the respondent's counsel, it is plain that the proceedings were held to have been improperly maintained, because it appeared that the person proceeded against was in possession as tenant of the petitioner under an unexpired lease. Neither does the dictum of Nelson, C. J., in Gardner *v.* Keteltas 3 *Hill*, 330, help the ruling made below in the case at bar. It is to the effect that the statute authorizes proceedings by a lessee against a former lessee in possession, as an assignee of the landlord; but it is not to be concluded therefrom that the learned Judge meant to be understood as entertaining the view that the landlord or lessor could not also maintain such proceedings. The remaining cases to which we are referred by counsel for the respondent are to the same effect as Insurance Co. *v.* Scott (*supra*), and so are equally inapposite. Trull *v.* Granger (8 *N. Y.* 115) holds, that the new lessee may maintain an action of ejectment against the lessee in possession whose term has expired; but, obviously, this is not at variance with the ruling of the Court in Imbert *v.* Hallock (*supra*). Other errors are presented by the record, but for the one discussed the order

appealed from must be reversed, and upon a new trial such other errors may not again appear.

Order appealed from reversed, and new trial ordered, with costs of the appeal and of the Court below to the appellants, to abide the event. The date for such new trial may be fixed in the order to be entered hereon.

GIEGERICH, J., concurred.

---

## IN THE MATTER OF THE APPLICATION OF MARY N. JORDAN *v.* THE BOARD OF EDUCATION *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, SEPTEMBER, 1895.

§§ 2125, 2140.

*Certiorari—will not issue to compel a rehearing—mandamus—not the proper remedy to review erroneous decision.*

Whether a default shall be opened and a rehearing had is purely matter of discretion, and the determination of the question is not subject to revision and reversal by another tribunal.

Where the relator fails to apply for a writ of *certiorari* until more than four months after the determination to be reviewed becomes final and binding, such four months' limitation shall be an insuperable bar to the issuance of the writ.

*Mandamus* is not the proper remedy to review an erroneous decision.

People *v.* Martin, 13 *Miss.* 21, distinguished.

(*Decided September*, 1895.)

Application for writs of *certiorari* and *mandamus.*

*Matthews & Koehler*, for relator.

*Francis M. Scott*, for respondents.

PRYOR, J.—By the notice of motion the respondents

are required to show cause why a writ of *certiorari* should not issue to review relator's dismissal from the position of teacher in a public school of the city; and why a writ of *mandamus* should not be allowed to reinstate the relator in that position.

The relator was dismissed the 2d of March, 1895; and her application for a *certiorari* was made September 6th, 1895. Obviously, therefore, the four months' limitation in section 2125 of the Code opposes an insuperable bar to the issuance of the writ. Hence, in their brief, counsel for the relator disclaim any purpose to challenge her dismissal, and propose only to review "the refusal of the Board of Trustees to grant her a rehearing."

Whether a default shall be opened and a rehearing had is purely matter of discretion, and the determination of the question is not subject to revision and reversal by another tribunal. People *v.* French, 110 *N. Y.* 494; Stevens *v.* Glover, 83 *N. Y.* 611; Fleischmann *v.* Stern, 90 *N. Y.* 110; *Code*, § 2140. *Certiorari* to compel the concession of a favor would be an anomaly in jurisprudence.

But upon the papers it is not apparent that the respondents abused their discretion in refusing the rehearing. The trial of the relator was upon due notice. She failed to appear and defend, because, as she now alleges, she was prevented by illness. But she did not communicate the fact of her disability to the Board, nor request an adjournment until her recovery. In their brief her counsel say that she "refrained from attending the meeting and allowed the trustees to proceed in her absence," because it was manifest that the board "had determined to get rid of her, * * * and she believed she would not be given a fair and impartial trial," and yet she applied to the Board for a rehearing and proposed to make defense before the same tribunal. She had notice of her dismissal on the 4th of March, and not until the 4th of June did she

solicit a rehearing. Then, too, the fact of her illness, as the occasion of her absence from the trial, is challenged by the respondents.

The case is plainly and essentially distinguishable from People *v.* Martin, 13 *Miss.* 21.

My conclusion is that the reason given by the respondents for the denial of a rehearing, namely, laches and bad faith, is not so destitute of foundation as to imply a mere arbitrary exercise of power.

Supposing the application for the writ in due season, and the action of the Board in the dismissal of the relator open to review, upon the authorities I should be constrained to uphold the determination. People *v.* Board, 3 *Hun*, 177; Gorlitz *v.* Board, 52 *Super.* 520; Fisk *v.* Board, 69 *Hun*, 212.

In applying both for a writ of *certiorari* to review the trial and of *mandamus* to reinstate her, the relator would unite processes of essentially distinct and repugnant functions, namely, to revise a judicial determination and to enforce a ministerial duty. But, disregarding the misjoinder and waiving too the objection of laches (People *v.* Justices, 78 *Hun*, 334), the relator exhibits no case for the allowance of a writ of *mandamus*. Her right is not clear; she had another remedy, *certiorari*, which she lost by culpable delay; another appointee occupies the place to which she would be restored, and her dismissal was the result of a trial which may not be reviewed upon *mandamus*. People *v.* Common Council, 78 *N. Y.* 33, 39; People *v.* Board, 107 *N. Y.* 235; People *v.* Claflin, 104 *N. Y.* 96.

Writs disallowed, without costs.

## BARNETT HARRIS *et al.* v. LEOPOLD R. TREU *et al.*

NEW YORK SUPERIOR COURT, SPECIAL TERM, OCTOBER, 1895.

§§ 2262, 2265.

*Summary proceedings—injunction to stay warrant and open judgment denied.*

The fact that a District Court Justice cannot open a default taken in summary proceedings does not imply that a Court of equity must for that reason supply the absence of the jurisdiction by the assertion of its authority.

The rule is that where a party is sued in a Court of law having exclusive jurisdiction of the subject-matter, he must make his defense there, and cannot resort to equity, unless he is hindered or prevented from making such defense. Equity will not relieve from a judgment at law except for fraud, accident, surprise or manifest injustice, unmixed with fault or negligence on the complainant's part; and on this principle, an injunction will not be granted if the person seeking it could, by proper diligence, have protected himself from injury by the ordinary means at law.

(*Decided October*, 1895.)

Motion by plaintiff for injunctive relief.

*A. Cohen*, for motion.

*Kurzman & Frankenheimer*, opposed.

McADAM, J.—On the return of the precept in summary proceedings instituted in the District Court for non-payment of rent, the tenants appeared and obtained a short delay to file their answer, which they subsequently submitted, but were told that it was too late, as judgment by default had been entered and a warrant to dispossess issued. The plaintiffs (the tenants) by their bill filed herein seek to annul the warrant, open the judgment

and reinstate the tenancy, so as to permit them to pay the rent and costs and discharge the proceedings. The right to such relief is, strange to say, based upon their own default, not on the ground of fraud, want of jurisdiction or the like, and is urged on the supposed lack of any other adequate remedy.

The fact that the District Court Justice cannot open a default taken in summary proceedings does not imply that a Court of equity must for that reason supply the absence of the jurisdiction by the assertion of its authority. The proceedings had in the lower Court are regulated by statutory enactments which clearly define the rights, duties and remedies of parties thereto; and if the remedy for review with the stay which follows (Code, sec. 2262) is insufficient for present purposes, it is because the Legislature in its wisdom did not intend to further enlarge the rights of tenants summarily proceeded against under said enactments. Indeed, the Legislature, to make itself clearly understood, declared in sec. 2265 of the act, that an injunction shall not be issued after judgment in such proceedings, except in a case where the final judgment in an action of ejectment would be stayed thereby, and this is not such a case.

The tenants had their day in Court, and if they failed to avail themselves of any of their legal rights it is because of their own neglect. If, on the other hand, they have been unjustly deprived of any legal rights by the action of the Court below, the appeal provided for furnishes a complete remedy for the wrong.

The rule is that where a party is sued in a Court of law having exclusive jurisdiction of the subject-matter, he must make his defense there, and cannot resort to equity, *unless he is hindered or prevented from making such defense.* Equity will not relieve from a judgment at law, except for fraud, accident, surprise or manifest injustice, *unmixed with fault or negligence* on the com-

plainant's part (*Hilliard on New Trials*, 2d ed., 590); and, on this principle, an injunction will not be granted if the person seeking it could, by proper diligence, have protected himself from injury by the ordinary means at law. Cases collated in 2 *Daniel's Ch. Pr.*, 4th ed., 1621.

There is nothing which calls for equitable interference with the proceedings of the lower Court or the execution of its process. See cases collated in 2 *Abb. Dig.* 770.

The application for injunctive relief must therefore be denied.

---

## THE FARMERS' NATIONAL BANK OF ANNAPOLIS, Respondent, *v.* WILLIAM H. UNDERWOOD, Impleaded with CLARENCE H. VENNER, Appellant.

Supreme Court, General Term, First Department, November, 1895.

§ 873.

*Power of Court to extend time to answer until non-resident plaintiff complies with order for his examination—order binding while in force, though not properly granted.*

Although, under section 878 of the Code of Civil Procedure, the Court is without power by service without the State to require a non-resident party to come into the jurisdiction and submit to an examination, or punish him for contempt should he refuse, still it has the power to direct, upon a proper showing being made by a defendant for the examination of a non-resident plaintiff, that until such plaintiff shall submit himself to the jurisdiction of the Court for the purposes of such examination, the time within which the defendant shall be required to answer shall be extended, or such other relief afforded as will accord to the defendant the same rights against a non-resident as he would have against a resident plaintiff. *Held*, erroneous, where such relief

has been asked, for the Court not only to deny it, but to go one step further and direct that the defendant should serve his answer peremptorily within ten days.

As long as an order requiring a non-resident plaintiff to come within the State and be examined, remains in force, it must be assumed to have been regularly made, whether or no the Court had the power to grant the order; and the duty is upon the plaintiff either of moving to have it vacated or of complying with its terms.

(*Decided November*, 1895.)

Appeal from order denying motion to strike out the complaint and dismiss the action.

The order appealed from not only denied any relief asked by defendant, but extended relief to the plaintiff by requiring the defendant to serve his answer within ten days from the entry and service of the order appealed from.

This action was commenced by the service of a summons and complaint on the 9th day of November, 1894. The plaintiff is a resident of Annapolis, Maryland, where its president resides. On January 9, 1895, defendant obtained, *ex parte*, an order to examine the president of plaintiff as an adverse party, and an inspection and discovery of plaintiff's books, which order was vacated on plaintiff's motion. Subsequently two other orders, requiring plaintiff to give certain information, were obtained, one of which was granted in part and in part denied, and the last one of which was vacated on plaintiff's application. This being the situation of the proceedings, defendant on June 1, 1895, obtained an order for the examination of the president as an adverse party, directing him to appear for such examination in New York City. As this could not be served within the State, an order for service without the State was secured, and thereupon the service was made in Annapolis on the president and on the plaintiff's attorney. By reason of certain defects two other orders were obtained, and finally

on June 18th an order was secured, extending the time for the taking of the deposition and examination as provided for in the order of June 1st, until the 20th day of June, 1895, and further providing for service of the orders and a copy of the last order and the affidavit upon which it was granted "upon the attorneys of said plaintiff, and upon the president of the plaintiff, within or without the State, on or before the 19th day of June, 1895." This order was served, in accordance with its provisions, upon the attorney and the president, but on the return day the latter did not appear. Thereupon the defendant moved to strike out the complaint and dismiss the action, and for other relief, which motion was denied; and an order was thereupon entered which, besides denying the motion, contained this provision: "Ordered peremptorily that the defendant serve his answer upon the plaintiff's attorney within ten days after service of a copy of this order." The questions presented for consideration arise upon the appeal from this last order.

*Walter H. Underwood*, for appellant.

*Chas. De Hart Brower*, for respondent.

O'Brien, J.—It is conceded that plaintiff did not move to vacate; that he did not appear for examination, and that the order of June 1st as subsequently amended was in full force and vigor at the time the motion was made to dismiss the complaint. Upon this appeal, however, it is insisted that such order is void, because providing for the examination of the plaintiff's president in New York City, while the papers show that he resided in Annapolis, and that he could not be served within the State. And this proposition is seemingly supported by the case of Witcher *v.* Tribune Association, 14 *N. Y. Supp.* 291. In the opinion in that case it is said: "If it (the order)

had been made *ex parte* and the plaintiff had moved for its vacation upon affidavit showing that he is a non-resident, and that service cannot be made upon him in this State, the Court would have been bound to vacate it under the decision of the General Term of this Court in Dunham *v.* Insurance Co., 44 *N. Y. Super.* 337. There is no power in the Court to require the plaintiff, as a resident of another State, to come to New York from such State for the sole purpose of being examined." Without expressing assent in these views, we do not think such question is involved, the order for the examination not having been assailed by motion or vacated. As long as it remains in force it must be assumed to have been regularly made, and the duty was upon the plaintiff either of moving to have it vacated or of complying with its terms.

Although differing in its facts, the principle here involved is somewhat analogous to that in the cases of Dudley *v.* Press Pub. Co., 53 *Hun*, 347, and 58 *Hun*, 181. In the former, plaintiff moved to vacate extensions of time granted to defendant, and it appearing that efforts to serve an order for plaintiff's examination were unsuccessful because plaintiff had left the State, it was held that so long as the order for the plaintiff's examination remained in force it must be held to have been regularly made, and that it entitled the defendant to an examination of the plaintiff as a witness under its direction before the defendant could be compelled to serve an answer in the action. As therein said: "And if he fails to comply with the order legally and properly made, after being by its service brought to the knowledge of himself or his attorneys, he may forfeit his right to proceed in the action, and even entitle the defendant to a dismissal of the complaint. And in 58 *Hun*, 18, where the plaintiff moved to vacate the order for his examination, it was said: "No opportunity, therefore, was

afforded to the defendant to make a personal service of this order upon the plaintiff. But from the other circumstances in the case, * * * it is evident that the plaintiff has been actuated with the intention, when he has visited this city, of evading the order and practically declining to obey its mandate; and under these circumstances, the Court could not, with any respect for its own proceedings, listen to any application to vacate its order. It is his duty as a suitor in Court to obey the direction given by its Justices for the purpose of promoting the proceedings in the litigation, and as long as he intentionally avoids placing himself where he may be personally served with the order, he cannot consistently expect to be heard in an application to vacate it."

It is true that in both these cases the relief was denied upon the ground that the plaintiff was guilty of misconduct and was contumacious, in that being a resident of the State, he refused to obey an order served upon him within the State, and as to another order, absented himself so that service could not be obtained. They are authority, however, for the proposition that as long as the order for the examination remains in full force and effect it cannot be treated as a nullity, but that it is the duty of the person against whom it is obtained either to obey it or to move to have it vacated.

The regularity and sufficiency of the papers upon which the order of June 1st was granted having never, therefore, been called in question, it must be assumed that the order is a proper one and made upon proper application. And the order for the examination of the plaintiff's president being in full force and effect, the defendant was entitled to the benefit of such examination, and, failing to obtain the same by the default or disobedience of the plaintiff, he was seemingly entitled to some relief, for which he applied to the Court.

The suggestion that, with regard to obeying orders,

there is a distinction between those made as against a resident and those made against a non-resident party, if recognized, would present an anomaly in our practice; because in effect it would be according to a non-resident rights and privileges which are denied to our own citizens. It would in effect be holding that while, in an action brought against a resident, he must submit to all the orders and mandates of the Court, a non-resident can choose this forum and proceed in utter disregard of the Court's directions. We do not think a non-resident plaintiff can claim rights and immunities denied to a resident party, and ignore orders and directions of the Court brought to the actual knowledge of his attorney or himself. Non-residence does not enlarge his rights or diminish those of the defendant. If such a rule were to prevail, it would be easy to have claims assigned to non-residents, or in cases where they had claims in their own rights, to place themselves just outside of the jurisdiction of the Court and proceed against our citizens without being amenable to the orderly procedure which in actions affords to a defendant certain rights as against the plaintiff.

It may be, since the Code of Civil Procedure provides (§ 873) that service of the order "must be made within the State," that the Court is without power by service without the State to require a non-resident party to come into the jurisdiction and submit to an examination, or punish him for contempt should he disobey such an order. But this is an entirely different thing from saying that the Court has not the power to direct, upon a proper showing being made by a defendant for the examination of a non-resident plaintiff, that until such plaintiff shall submit himself to the jurisdiction of the Court for the purposes of such examination, the time within which the defendant shall be required to answer shall be extended, or such other relief afforded as will accord to the defendant the same rights against a non-resident as he would have

against a resident plaintiff. Without passing upon the question, therefore, as to whether the Court, by reason of the failure of such non-resident to appear within the jurisdiction for the purposes of service, could grant the motion to dismiss the complaint or the action, we think that it was not without power to accord some relief, and that it was erroneous, where such relief was asked, for the Court, not only to deny it, but to go one step further and direct that the defendant should serve his answer peremptorily within ten days.

We think, therefore, that so much of the order as requires the defendant to serve his answer should be reversed, and that relief should be accorded to the defendant by extending his time to answer until such time as the plaintiff submits himself to the jurisdiction of the Court, or applies for and secures a vacation of the order for his examination.

Order accordingly reversed with $10 costs of the motion below, and $10 costs on this appeal and disbursements.

VAN BRUNT, P. J., concurred.

---

## CHARLOTTE C. HOSMER *v.* JAMES M. GAUS *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, OCTOBER, 1895.

§ 3297.

*Compensation of referee on sale in foreclosure.*

Under section 3297 of the Code of Civil Procedure, as amended by chap. 241 of the Laws of 1895, fixing a referee's compensation on a sale of property under a decree of foreclosure at $50 where the property sells for less than $10,000.

*Held*, that the Legislature by the act in question intended to give additional compensation only in cases where the referee actually received and was accountable for $10,000 or more in cash; and where the property is sold subject to liens which, when subtracted from the purchase price, leave an actual consideration of less than $10,000, the referee is entitled to only $50.

(*Decided October*, 1895.)

Application to fix the compensation of a referee upon sale of real property.

The nature of the motion and the material facts are stated in the opinion.

*Edward H. Hawke, Jr.*, for referee and motion.

*James R. Marvin*, for defendants, opposed.

GIEGERICH, J.—This is an application to fix the compensation of a referee upon sale of real property, pursuant to section 3297 of the Code of Civil Procedure, as amended by chap. 241 of the Laws of 1895, which, among other things, provides: "A referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars unless the property sold for ten thousand dollars or upwards, in which event the referee may receive such additional compensation as to the Court may seem proper, or in any other cause five hundred dollars." It appears from the referee's report of sale that the mortgaged premises, consisting of two lots of land, were sold in separate parcels and realized together the sum of $47,000; that the same were sold subject to certain liens; and that the referee, after allowing the purchaser out of the total purchase price the amount of incumbering charges, aggregating $44,077.60, received and was actually accountable for the sum of $2,922.40 only. It seems to me that the Legislature by the act in question intended to give additional compensation only in cases where the referee actually

received and was accountable for $10,000 or more in cash. Inasmuch as the referee herein did not receive, nor was he at any time accountable for such sum, I think, under the circumstances, that he is not entitled to a larger amount than $50 as his compensation. I therefore fix it at that sum.

---

## MARGARET ELIZABETH ROUGE *v.* GABRIEL MARK ROUGE.

NEW YORK SUPERIOR COURT, SPECIAL TERM, NOVEMBER, 1895.

§ 635.

*Attachment against property in action for personal injuries.*

The attachment against property provided for by section 635, subd. 3, Code of Civil Procedure, as amended in 1895, in actions for personal injuries, is limited to the probable amount of the recovery. The practice in this respect should be assimilated to that followed in granting orders of arrest.

The new remedy provided by the amendment of 1895 is designed more to coerce the appearance of the tort-feasor than to impound his property.

The rule that a statute does not have a retroactive effect, does not apply where the statute effects a remedy; in such a case, it may be applied to an action pending or a right of action existing at the time the remedy is invoked.

(*Decided November*, 1895.)

Motion to vacate attachment against property.

*David Murray*, for motion.

*Edward Gebhard*, opposed.

McADAM, J.—The plaintiff brings the action against

the defendant for alienating the affections of her husband. The gravamen of the complaint is that while plaintiff was living in the city of Geneva, Switzerland, with her husband, the defendant made unto the husband false and malicious statements of and concerning plaintiff, that she was not a good, true, faithful and worthy wife; and that the defendant caused an action to be begun by the plaintiff's husband against her in a Court of competent jurisdiction in Switzerland aforesaid for the purpose of procuring a judgment therein annulling and ending her marriage with said husband, which suit is now pending. And by reason of the acts of the defendant the plaintiff claims she has been deprived of the support, society and affection of her husband, to her damage $25,000.

At the time of the commencement of the action the plaintiff procured an attachment under subdivision 3 of section 635 of the Code, as amended in 1895, which provides that an attachment against property may be granted in an action for "an injury to person or property, in consequence of negligence, fraud or other wrongful act." The latter portion of this provision is comprehensive enough to embrace the present case. Wilson *v.* McGregor, 34 *St. Rep.* 775.

Prior to this amendment resort to the process of attachment was allowed only to "creditors," or for injuries to property, where the amount demanded was capable of accurate computation; the existence and restriction of the remedy being of course dependent upon the terms of the governing statute. While it is easy to understand why a creditor proceeding against a non-resident should be allowed to impound property found within the jurisdiction of the Court to answer as security for any claim existing or for the amount in dollars and cents of any specific injury done to property, it is not apparent on first view why the Legislature should have included actions for injuries to the person, where the damages are unliquidated,

and where the plaintiff in his declaration and affidavit generally places them at an unusually high figure. Neither the complaint nor affidavit in such an action can furnish any certain guide from which the Judge granting the attachment may determine what the actual damages are. The Legislature certainly did not intend that the attachment should run for any amount a plaintiff might see fit to insert in the *ad damnum* of his complaint.

The plaintiff has in this instance fixed the damages at $25,000; she might have put them at $250,000, but it does not follow that property of the defendant is to be impounded to answer the demand thus made. The practice in this respect must therefore be assimilated to that followed in granting orders of arrest. Where such orders are made in actions for injuries to the person, the bail is fixed in such sum as the Judge may judicially determine, in view of the nature and extent of the injuries complained of and the probable ultimate recovery. Doubtless the legislation was intended to reach a class of cases where injuries to the person were inflicted upon residents of this State, who in consequence of the non-residence of the wrong-doer were practically remediless. No order of publication would lie because no property has been attached. To supply this omission in the law the new remedy was furnished; and it was designed more to coerce the appearance of the tort-feasor than to impound his property. With this end in view the act may be wise legislation; but to go further and grant attachments against the property of non-residents in ordinary tort actions for any sum the plaintiff sees fit to demand would lead to great abuse.

It is evident, therefore, that the Legislature intended that a Judge, in issuing the attachment, should exercise judicial discretion as to the damages likely to be recovered in order to fix the amount for which the attachment should go, upon the principles which guide him in

granting an order of arrest; the plaintiff may thus recover the sum impounded if the damage is equal to that amount, and the defendant by his non-appearance prevents a judgment *in personam* that might be enforceable by an action thereon in any other jurisdiction.

Where the action is between foreigners for torts committed in a foreign country, the Courts of this State may take jurisdiction, or, in their discretion, decline it. De Witt *v.* Buchanan, 44 *Barb.* 31; Burdick *v.* Freeman, 46 *Hun*, 138, aff'd 120 *N. Y.* 421. Whether the Court in its discretion should have declined jurisdiction here is a question that need not be considered now, as that matter was determined in the plaintiff's favor upon the issuing of the attachment. *Code*, § 416.

Upon the facts stated in the complaint and affidavit, it is not at all likely that the plaintiff would recover more than $5,000 damages, and there is no reason why the attachment should be held for a greater amount; and in analogy to the practice of reducing bail on arrest, the attachment herein will be reduced to that sum.

The attachment not being a writ of right (Sartwell *v.* Field, 68 *N. Y.* 341; Allen *v.* Meyer, 7 *3id.* 1), the Court might, and perhaps would, after a general appearance in the action, vacate it, in the exercise of a wise discretion, particularly if it appeared that it was used oppressively. But that subject need not be seriously considered here, for it is not now before the Court, as the defendant has simply interposed a special appearance for the purpose of this motion only.

The defendant claims that as the cause of action accrued prior to the passage of the act the case does not fall within its provisions, and to hold that it did would be to give the statute a retroactive effect, contrary to the canons of statutory construction. But to these rules there are exceptions, notably among which is, that where the act affects the remedy it may have a retro-

spective effect; that is, may be applied to cases pending or rights of action existing at the time the remedy is invoked. 1 *Kent's Com.* 455; People *v.* Spicer, 99 *N. Y.* at p. 233; Neass *v.* Mercer, 15 *Barb.* 318; Southwick *v.* Southwick, 49 *N. Y.* at p. 517; People *v.* Supervisors, 65 *id.* 300; Lazarus *v.* Met. El. R. R. Co., 145 *id.* 581. The principle was followed in Dickerson *v.* Cook, 16 *Barb.* 509, where it was held that section 292 of the Code of 1849, authorizing the examination of a judgment debtor, upon the return of an execution issued against him unsatisfied, applies to cases where the execution was issued before the Code took effect as well as to executions issued subsequent to that time.

It follows that the motion to vacate the attachment must be denied, but the amount for which the property is seized or impounded will be reduced to $5,000.

---

## ESSIE M. GALLAGHER, Respondent, *v.* THE DAVID STEVENSON BREWING COMPANY, Appellant.

New York Court of Common Pleas, General Term, June, 1895.

§§ 502, 2244.

*Counterclaim against guardian personally not available in summary proceedings.*

A guardian in socage may lease the infant's real estate in her own name, and maintain a summary proceeding for recovery of their possession.

A counterclaim against the landlord personally may not be interposed in a summary proceeding brought by her in her capacity as guardian.

(*Decided June*, 1895.)

Appeal from judgment of District Court in a summary proceeding.

The opinion states the case.

*George W. McAdam*, for appellant.

*Charles A. Flammer*, for respondent.

PRYOR, J.—In a summary proceeding for the dispossession of a delinquent tenant, it appears that the pursuer held the demised premises as guardian in socage for her infant children, and that she leased them in her own name and as of her own right. The proceeding is prosecuted by her as guardian for the infant owners.

For affirmative defense it was pleaded and proved that she was indebted to the tenant, individually, in a sum exceeding the amount of the unpaid rent. Judgment went against the tenant.

It is argued for the appellant that since the lease was by Essie M. Gallagher in her own right, and the petition is by her as general guardian of her infant children, the conventional relation of landlord and tenant does not subsist between the parties to the proceeding. But, upon the evidence, the mother was guardian in socage of her infant children, and it appears that before the commencement of the proceeding she was duly appointed their general guardian.

Whether as guardian in socage or general guardian, she had custody of the infants' real estate, was entitled to receive its rents and profits, might lease it and recover the rent in her own name, and might maintain trespass or ejectment in respect of her wards' land. Field *v.* Schiefflin, 7 *Johns. Ch.* 150; Holmes *v.* Seeley, 17 *Wend.* 78; Pond *v.* Curtiss, 7 *Wend.* 45; Thacker *v.* Henderson, 63 *Barb.* 271, 277–8; Matter of Hynes, 105 *N. Y.* 560, 563; Byrne *v.* Van Hoesen, 5 *Johns.* 65. Such being the relation of the respondent to the de-

mised premises, she had a right to lease them in her own name, and to maintain a summary proceeding for recovery of their possession. Sylvester *v.* Ralston, 31 *Barb.* 286. Though the premises be the property of her wards, in legal effect she is the landlord. Indeed, the tenant is estopped to dispute her title.*

This being so, it is contended that the debt against Essie M. Gallagher in favor of the tenant is a legal counterclaim in bar of the proceeding. *Code Civ. Pro.*, § 2244, as amended in 1893. But by subdivision 3, § 502, of the Code, "if the plaintiff is trustee for another, or if the action is in the name of another who has no actual interest in the contract on which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim." The respondent prosecutes as guardian, *i. e.* as trustee for her wards; and since she owes the debt in her own proper capacity, it is not available against her claim in the capacity of guardian.

The judgment is affirmed, with costs.

All concur.

---

## GEORGE BARKER, Respondent, *v.* THE CUNARD STEAMSHIP COMPANY, LIMITED, Appellant.

Supreme Court, General Term, First Department, December, 1895.

§§ 834, 1780.

*Action by resident of the State against a foreign corporation—resident of plaintiff—jurisdiction—knowledge obtained by physician—privileged.*

In an action by a passenger against a common carrier, to recover

* When the relation of landlord and tenant is made out, the tenant is estopped from disputing his landlord's title. People ex rel. *v.* Kelsey, 14 Abb. 372.

damages for personal injuries claimed to have been sustained through alleged negligence of defendant, the defendant being a foreign corporation, the complaint alleged that plaintiff is a resident of the State of New York. Such allegation was denied by the answer, but the record contains evidence tending to substantiate it. There was no fact inconsistent with the claim that plaintiff was a resident when the action was begun, and no question in respect to his residence or the jurisdiction of the Court was raised on the trial. *Held*, a general verdict having been rendered, that it would be presumed that all material issues of facts raised by the pleadings had been determined in favor of the prevailing party, and that it was too late on appeal to raise the question of jurisdiction on the ground that plaintiff's residence had not been established.

Allegations of time in a complaint are presumed to refer to the conditions existing when the action was begun, unless controlled by other allegations showing that a different date is intended.

The knowledge of a physician acquired from an inspection of and conversations with the plaintiff while the relation of physician and patient existed between them is privileged; and this privilege is not waived by the plaintiff having called other physicians to testify to his condition anterior and subsequent to the time that he was in the hospital under the first physician's care.

(*Decided December*, 1895.)

Appeal from a judgment entered on a verdict, and from an order denying a motion for a new trial made on the minutes.

*William M. Ivins*, for appellant.

*Franklin Pierce*, *Edward B. Thomas* and *Abraham Gruber*, for respondent.

FOLLETT, J.—This action was begun December 12, 1890, by a passenger against a common carrier to recover damages claimed to have been sustained by the alleged negligence of the defendant. September 23, 1890, the plaintiff took a second cabin passage from Liverpool on defendant's boat Gallia for New York, at which port the ship arrived October 4th. It is alleged

that a defective port, which was a few inches above the plaintiff's berth, admitted such quantities of water that he was constantly wet and thereby contracted pneumonia, which resulted in the permanent impairment of his health. The question lying at the threshold of this case is, Has the Court jurisdiction of the action? "An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action * * *" *Code Civ. Pro.*, § 1780. It is alleged in the complaint that the defendant is a foreign corporation "and that the plaintiff is a resident of the State of New York." The defendant in its answer admits that it is a foreign corporation, is the owner of a steamship line, and is a common carrier of passengers, as alleged in the complaint, and "then denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations contained in the complaint." Allegations of time in a complaint are presumed to refer to the conditions existing when the action was begun, unless controlled by other allegations showing that a different date is intended. Townsend *v.* Norris, 7 *Hun*, 239; Broome *v.* Taylor, 9 *id.* 155; Burns *v.* O'Neil, 10 *id.* 494. Under the pleadings, the residence of the plaintiff when the action was begun was a fact in issue. The defendant on the trial raised no question in respect to the jurisdiction of the Court, or the residence of the plaintiff. A general verdict (*Code Civ. Pro.*, § 1186) was rendered, and it is presumed that all material issues of fact raised by the pleadings were determined in favor of the prevailing party. Wolf *v.* Goodhue Fire Ins. Co., 43 *Barb.* 400, aff'd 41 *N. Y.* 620; Van Pelt *v.* Otter, 2 *Sweeny*, 202; Murphy *v.* Lippe, 3 *J. & S.* 542; Soria *v.* Davidson, 21 *J. & S.* 52; s. c., 9 *N. Y. Civ. Pro.*, § 23. The jurisdiction of a Court of general jurisdiction is always presumed and can never be questioned, unless the want of jurisdiction is shown at the trial or ap-

pears on the record. Mills *v.* Martin, 19 *John.* 733; Bloom *v.* Burdick, 1 *Hill*, 130; Downes *v.* The Phœnix Bank, 6 *id.* 298; Hutchins *v.* Brand, 6 *How. Pr.* 72. If no evidence had been given in respect to the residence of the plaintiff, the jurisdiction of the Court could not have been questioned on appeal, unless the non-residence of the plaintiff is disclosed by the record. The plaintiff testified on the trial, which occurred March 7, 1895, "I reside at 156 East One Hundred and Twenty-seventh street, in the City of New York." He was not asked by either side where he resided at any time previous to the trial, and there was no fact inconsistent with the idea that he was a resident of this State on the 12th of December, 1890, when the action was begun. The vessel on which the plaintiff was a passenger arrived in New York, October 4, 1890, and from that date until November 6, 1890, he was a patient in St. Vincent's Hospital in this city. The plaintiff was a cabinetmaker. Later in the year he worked for the Pullman Palace Company, in Chicago, Ill., which employment he left in the summer of 1891 and came east. In the winter of 1891 and 1892 he worked for that company at St. Charles, Mo. Afterwards he worked for the same company at Buffalo until the spring of 1893, when he began work for the same company in their shop at Chicago, and continued there until June, 1893. Afterwards he worked for the Illinois Central Railroad of Chicago, and at the time of the trial he was at work for the Manhattan Elevated Railroad Company. The defendant asked no questions of the plaintiff in respect to his residence, and gave no evidence on that issue. Again, upon the defendant's offer the complaint was received in evidence. The testimony does not conclusively show that the plaintiff was not a resident of this State when the action was begun, and the presumption of jurisdiction is not rebutted. If it can be said that the evidence is capable of different inferences as to the place of residence of

the plaintiff, the answer is that the jury has drawn the inference and determined the question in his favor. In case the jurisdiction of a Court of general jurisdiction turns upon a question of fact, the issue must be determined by the jury. United States *v.* Sanders, *Hemp.* 483; *Thomp. Tri.*, § 2186; Roderigas *v.* East River Savings Inst., 63 *N. Y.* 460, 464.

Section 427 of the Code of Procedure provided that an action could be brought by a resident of this State against a foreign corporation for any cause of action; that an action could be brought against such a corporation by a non-resident in case the cause of action arose in this State, or the subject of the action be situated within this State.

Root *v.* The Great Western R'y Co., 65 *Barb.* 619; s. c., 1 *T. & C.* 10, aff'd 55 *N. Y.* 636, was brought by a resident of the State of Michigan against a Canadian corporation for the loss of the plaintiff's goods in Canada or in the State of Michigan. It was held that the cause of action did not arise in this State; that the plaintiff was a non-resident, and that the action could not have been maintained had the defendant pleaded the plaintiff's non-residence, but that the objection was waived by failure to raise it on the trial, and that it could not be raised for the first time on appeal. In Downes *v.* The Phœnix Bank, 6 *Hill*, 297, it was held that the non-residence of a plaintiff in an action against a foreign corporation was a plea in abatement, and must be pleaded. The same rule was held in Pease *v.* Delaware, Lackawanna & Western R. R. Co., 10 *Daly*, 459, and in Steers *v.* Liverpool, N. Y. & P. Steamship Co., 57 *N. Y.* 1, 7. The issue in respect to the plaintiff's residence having been found in his favor by the general verdict, and the question not having been raised at the trial, it must be held that the Court had jurisdiction of this action.

The position of the learned counsel for the defendant, that the Court erred in submitting the questions as to the

defendant's negligence and the plaintiff's freedom from contributory negligence to the jury, cannot be sustained. The plaintiff testified that the port leaked so badly that his berth and the one underneath were saturated with water. Measures, who occupied a stateroom near the plaintiff's, testified that on the morning of the 25th he was in the plaintiff's room, saw that his berth and the one underneath it were wet; that the next day he was in the plaintiff's room and that the water had come through the port as before; that he saw water coming through it, and that on the third and fourth days he saw water coming through it. The plaintiff complained of the condition of the port to the employees of the ship, as they admit, though they testified that it was in perfect order and did not leak. This evidence presented a question of fact, which was rightly submitted to the jury, and it cannot be said that the verdict was contrary to the weight of evidence. The defendant did not deny that, in case the port leaked in the manner described, it was defective and might have been easily remedied. The defendant's marine superintendent testified that when the ports are perfect, as they should be, they do not admit water and that they should be kept in a condition so as not to leak. The learned counsel for the defendant asserts that the plaintiff was guilty of contributory negligence by non-compliance with the following rule, which was posted in his stateroom: "6. Passengers having any cause for complaint are requested to communicate at once with the chief steward." The plaintiff did complain of the condition of the port to the first and second intermediate stewards, to the bedroom steward; and the chief steward testified that he went into the plaintiff's room on Wednesday, October 1st, and the plaintiff told him that his bed was damp and pointed to the port. The ship's physician testified that the plaintiff complained to him that water had come through the port and wet his bed. There is cer-

tainly no foundation for the claim that the plaintiff was guilty of contributory negligence in not bringing to the attention of the defendant's servants the condition of the port.

The Court did not err in refusing to permit the defendant to prove by Dr. Haubold the condition of the plaintiff when he entered St. Vincent's Hospital, and the statements made by him in respect to the previous condition of his health. The knowledge of this witness was acquired from an inspection of and conversations with the plaintiff while the relation of physician and patient existed between them, and was privileged. *Code Civ. Pro.*, § 834. This privilege was not waived by the plaintiff having called other physicians to testify to his condition anterior and subsequent to the time he was in the hospital. Hope *v.* Troy and Lansingburgh R. R. Co., 40 *Hun*, 438, aff'd 110 *N. Y.* 643; Record *v.* Village of Saratoga Springs, 46 *Hun*, 448, aff'd 120 *N. Y.* 646.

The charge was eminently fair and elaborate, covering every issue of fact in the case, and by it the jury was correctly instructed in the rules of law applicable to those issues. The learned counsel for the defendant, not being satisfied with this presentation of the case to the jury, preferred thirty-eight requests to charge, eighteen of which were charged without qualification, though many of them were immaterial, and others were covered by the instructions previously given. Twenty requests were refused, some partially and others wholly. Thereupon the defendant's counsel took this exception: "I except to your Honor's refusal to charge those requests which you declined." Many of the requests were untenable, others were irrelevant, and others had been covered by the charge as delivered. A general exception of this kind raises no question unless every one of the requests should have been granted in the terms in which they were preferred. Hoyt *v.* The Long Island R. R. Co., 57 *N. Y.* 678; Smedis

v. Rockaway Beach R. R. Co., 88 *id.* 13; Read v. Nichols, 108 *id.* 224; Huerzeler v. C. C. T. R. R. Co., 139 *id.* 490; Beaver v. Taylor, 93 *U. S.* 46.

An examination of the entire record fails to disclose any error calling for a reversal of the judgment, which, and the order denying a motion for a new trial, should be affirmed, with costs.

PARKER, J., concurs.

VAN BRUNT, P. J. (concurring).—I concur in the conclusion arrived at by Mr. Justice Follett in the case at bar. I cannot, however, concur in the statement in his opinion, as applicable to this case, that the Supreme Court being a Court of general jurisdiction, its jurisdiction must be presumed and cannot be questioned unless the want of jurisdiction is shown at the trial or appears upon the record. In respect to foreign corporations the Supreme Court has never been a Court of general jurisdiction. It has no jurisdiction of action against foreign corporations, except such as is conferred by statute. Hence, the rule which ordinarily applies to this Court as a Court of general jurisdiction cannot obtain in actions against foreign corporations. It must appear somewhere in the record that jurisdiction exists.

The pleader, in drawing the complaint in the case at bar, evidently understood this position, because he alleges that the defendant is a foreign corporation and that the plaintiff is a resident of the State of New York, bringing himself within the class of persons who may resort to the Courts of this State for the purpose of redressing wrongs received by them from foreign corporations. This allegation in regard to the residence of the plaintiff is presumed, under the ordinary rules, governing allegations of time in a complaint, to refer to the conditions existing when the action was begun unless it appears otherwise

from the pleading. It is true that this allegation of residence was denied by the answer; but the record contains evidence in regard to the residence of the plaintiff, and no objection seems to have been taken at the trial that this allegation of the complaint was not proven. We may therefore fairly infer that all claim in that behalf was abandoned, no point having been made in respect thereto, and that the evidence, meager as it is, was considered sufficient. Under these circumstances it is too late now to raise the question of residence and claim want of jurisdiction because that fact is not established.

It is undoubtedly true that if the record had contained evidence showing that this plaintiff was not a resident of this State at the time of the commencement of the action, the Court might, at any stage of the action, of its own motion raise the question and dismiss the action. Robinson *v.* Oceanic Steam Navigation Company, 112 *N. Y.* 315.

For the other reasons stated in the opinion of Mr. Justice Follett, I concur in the affirmance of the judgment.

---

## HERMAN FROMME AND ABRAHAM FROMME, RESPONDENTS, *v.* WILLIAM E. GREY, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, DECEMBER, 1895.

### § 14.

*Interposition of false answer not a contempt of Court.*

The knowingly interposing a false answer is not a contempt of court for which a party may be punished in a civil proceeding.

A penal statute cannot be extended by implication or construction

to cases within the mischief if they are not at the same time within the terms of the act, fairly and reasonably interpreted.

(*Decided December*, 1895.)

Appeal from order of the General Term of the City Court, affirming an order of the Special Term adjudging the defendant, William E. Grey, guilty of a contempt of Court, fining him $2,154.13, and condemning him to close custody until he shall pay the said sum, with interest and costs. The proceeding for contempt was instituted after execution issued and on examination of the debtor in a supplementary proceeding.

*Wm. B. Hornblower* and *Frederick M. Littlefield*, for appellant.

*Fromme Brothers* and *Jacob Fromme*, for respondents.

PRYOR, J.—Failing to secure satisfaction of a judgment by the ordinary processes, plaintiffs seek to enforce it by proceeding as for a contempt committed by the defendant in interposing a false answer in the action; and the question for determination is, whether for perjury in verifying a pleading a party be guilty of contempt of Court.

The proceeding is obviously as a civil remedy (People *v.* Court of Oyer, etc., 101 *N. Y.* 245, 247); and it purports to go upon subdivision 2, section 14, of the Code, which denounces as a contempt "any deceit or abuse of a mandate or proceeding of the Court."

That a pleading is not a "mandate of the Court," is too plain a proposition to require argument in its support. And, if a proceeding *in* Court, it is certainly not a "proceeding *of* the Court." A pleading is purely the act of the party, in which he proffers to his adversary a statement of his claim or defense, and to which no order or sanction of Court is requisite. Though infected with per-

jury, therefore, it involves no abuse of the mandate or proceeding of the Court.

The statute stigmatizes "any deceit" as a contempt. Deceit in what? Manifestly, deceit upon the Court in procuring its mandate or process. But how can there be deceit upon the Court in respect of a matter in which the Court has no agency? How can there be deceit in procuring from the Court that which does not issue from the Court—that which the Court can neither allow nor withhold? The fundamental and essential principle of a contempt is an affront to the authority of the Court (*In re* Chiles, 22 *Wall. U. S.* 157, 168); but a false pleading nowise challenges or disparages that authority—no more than perjured testimony on the trial.

The provision of the Code under consideration specifies the "putting in fictitious bail or a fictitious surety" as a contempt; but omits to characterize a false pleading as such offense. By what authority may the Court, by construction, supplement defective legislation of a penal nature? "A penal statute cannot be extended by implication or construction to cases within the mischief if they are not at the same time within the terms of the act, fairly and reasonably interpreted." Verona, etc., Co. *v.* Murtaugh, 50 *N. Y.* 314. And this stringency of construction is all the more applicable to an offense to conviction, of which neither an indictment nor the verdict of a jury, nor common law evidence, is necessary in a trial for which the accused is not confronted with the witnesses against him, nor allowed the inestimable privilege of cross-examination, nor protected by any of the legal safeguards of criminal justice, and upon sentence for which he may be confined in close custody for an indefinite period. Code, § 2285; Matter of Watson, 69 *N. Y.* 536, 544. For what, too, is it proposed so to extend the scope and operation of this statute? Not to vindicate the dignity of the Court, nor to chastise an offense against the public; but

to enable a private suitor by a criminal proceeding to collect a debt for enforcement of which the law already supplies him with civil processes of adequate efficacy.

Imprisonment for debt is the relic of a barbarous age, and is repugnant to the liberal and enlightened spirit prevalent at this day and in this country. Recent enactments restricting the right of arrest and detention in civil actions, attest the police of this State in prohibiting deprivation of liberty as an expedient for the enforcement of civil remedies; and "it would be improper for the Court to evade the object and intent of the statute by resorting to an attachment for contempt * * * in a case where the Legislature has prohibited imprisonment by execution." WALWORTH, Ch., in Hosack *v.* Rogers, 11 *Paige*, 603, 605.

In the interpretation of a statute the consequences of a particular construction are a matter for consideration. *Bishop on Written Laws*, §§ 82, 93. If the contention of the respondents is to prevail, oppression and injustice to the citizen are obvious and inevitable. Whenever by the verdict of a jury the untruth of an answer is ascertained, it will be open to a plaintiff, unable to enforce his judgment by the ordinary processes provided by law, to have recourse to the sharp and severe redress of commitment for contempt; and we may be sure that those processes will be superseded by this more peremptory and efficacious pressure. Thus, notwithstanding the nominal abolition of imprisonment for debt, our jails will be replenished with debtors under commitment for contempt.

Abundant authority requires a strict construction of the statute of contempts. "There exists no undefined power authorizing the commitment of citizens for contempt in cases defined and limited by statute." Sherwin *v.* People, 100 *N. Y.* 351, 358. "The power which Courts possess of punishing for contempts is, in its nature, an exception to the provisions of the Constitution. It is a power to deprive a man of his liberty, without a jury and without

a regular trial. It cannot, therefore, be extended, in the least degree, beyond the limits which have been imposed by statute. No implication, and no fancied necessity, can be permitted to add to the literal meaning of the words by which the Legislature has restricted this power." LEARNED, P. J., in Rutherford *v.* Holmes, 5 *Hun*, 317, 319, aff'd 66 *N. Y.* 368. "It is only in cases which have been prescribed by the Legislature as proper subjects for such punishment that it can be imposed upon an offender. While the misconduct of the relator well deserved adequate punishment, as long as it is not within the provisions of law declaratory of cases of willful contempt, it could not be made the subject of punishment." DANIELS, J., in People *v.* Oyer and Terminer, 36 *Hun*, 277, 283. "The absence of such a power from these sections"—in the present case to punish for a false answer—"is a very cogent indication that it was not designed to be possessed by the Court." Jacquin *v.* Jacquin, 36 *Hun*, 378, 380. Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt. California *v.* Molitor, 113 *U. S.* 609, 618.

It is contended, however, that the point in dispute is already adjudged, and that we are precluded by *stare decisis* from a reversal of the order. If, indeed, we be concluded by authority there is at once an end of the controversy.

In support of their position the respondents adduce The Martin Cantine Company *v.* Warshauer, 7 *Misc.* 412 —an explicit adjudication in their favor. But it was a Special Term decision; and though by a Judge of high repute, is not of controlling authority in this Court. The conclusion is supported by no argument, but rests only upon the assumption that "a pleading is a proceeding of the Court;" a postulate which, for reasons already given, we are unable to concede.

Koehler *v.* Campbell, *Law Journal*, May 22, 1894, is

another determination to the same effect; but this too is a ruling at Special Term, and stands, moreover, upon no other ground than the authority of The Martin, etc., Co. *v.* Warshauer (*supra*).

The only other precedent on which the respondents rely is the case *In re* Hall, 32 *Suppl.* 883; but, while this is an adjudication at General Term, and so of persuasive influence, it is not of imperative obligation upon a tribunal of co-ordinate jurisdiction, and as the Court bases its conclusion upon neither argument nor authority, we cannot yield our reasoned conviction to a mere *ipse dixit.*

On the other hand, this Court, in two deliverances at General Term, has deliberately declared that the interposition of a sham answer is not a contempt. Moffatt *v.* Herman, 17 *Abb. N. C.* 107; Simon *v.* The Aldine Publishing Company, 14 *Daly*, 279. True, the first decision, Moffatt *v.* Herman, was without an opinion; and hence respondents argue that it is not an adjudication of the point in controversy. But the head-note states otherwise; and the Court of Appeals, on review of the case, said that the Court of first instance did determine a sham answer to be a civil contempt. 116 *N. Y.* 131, 133. The second case, too—Simon *v.* The Aldine, etc., Co.—is challenged as mere *obiter.*

Conceding that in neither of these cases was the point in controversy expressly decided, still, upon reconsideration of the question, we are confirmed in the conclusion twice announced by us.

In compliance with the genius of the American institutions, every intendment and implication, not manifestly inadmissible, must be indulged in favor of the liberty of the citizen; and we are unwilling, upon a strained construction of a statute, to detain the defendant in jail for an indefinite time, in order that, by such constraint, he may be compelled to discharge a civil liability.

Orders reversed and defendant discharged, with costs and disbursements.

All concur.

---

MAUD A. GRISWOLD, PLAINTIFF-APPELLANT, *v.* META J. B. CALDWELL, INDIVIDUALLY AND AS TRUSTEE, ETC., *et al.*, DEFENDANTS; FRANKLIN BIEN, AS TRUSTEE, ETC., DEFENDANT-RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, NOVEMBER, 1895.

§§ 452, 453, 755–760.

*Code provisions for bringing in additional parties or substituting parties—substituted trustee where trust interest has devolved.*

Sections 755–760 of the Code of Civil Procedure, where the application is made by the person to be substituted or joined, authorize the substitution in the place of a party, of a person, who, *pendente lite*, has succeeded to the entire interest of such party, or upon whom the entire liability of the latter has devolved; and the joinder, with a party of one who, *pendente lite*, has only partly succeeded to the interest of such party, or upon whom the latter's liability has only partly devolved; by amendment of the pleadings or otherwise as the case requires.

At the time of the commencement of an action for foreclosure of a mortgage on real property the equity of redemption was in a certain person as trustee, and she was made a party defendant as such. After she had defaulted in pleading she resigned her trust and conveyed the mortgaged property to a new trustee appointed in her place by the Supreme Court. *Held*, That an order directing such new trustee to be *added* as a party defendant, under sections 452, 453, of the Code of Civil Procedure, was erroneous, the proper procedure being to *substitute* the new trustee, in the place of the former trustee-defendant, under sections 755–760 of the Code. The order of reversal, however, in the exercise of dis-

cretion and upon terms, directs the motion to be reheard at Special Term, in order that the proper relief in the premises may be granted.

(*Decided November*, 1895.)

Appeal from an order made at Special Term granting a motion of the trustee appointed in the place of the trustee defendant to be made a party to the action. Action for the foreclosure of a mortgage of real property.

*C. N. Bovee, Jr.*, for appellant.

*Benjamin N. Cordozo*, for respondent.

Bischoff, J.—The action is for the foreclosure of a mortgage on real property and at the time of its inception the equity of redemption was in Meta J. B. Caldwell, as trustee under the will of Stacy Pitcher, deceased. Mrs. Caldwell was made a party defendant as such trustee, and was named as such in the summons, complaint and notice of pendency of the action which was filed. After having defaulted in pleading in this action, and in proceedings instituted in the Supreme Court for her removal as such trustee, she resigned her trust and conveyed the mortgaged property to Franklin Bien, as trustee appointed in her place and stead. Before the time of the defendants to plead had expired the new trustee applied to be made a party to this action, claiming a right to that effect under sections 452 and 453 of the Code of Civil Procedure. In support of his application he asserted, by affidavit, that under the will of Stacy Pitcher the trustee was empowered, under certain conditions, to sell, but not to mortgage the land embraced within the trust; that Mrs. Caldwell had united with the plaintiff to evade the limitations of the will and to mortgage and incumber the property in contravention of the trust; that for a nominal consideration, and in form only, she had con-

veyed the property to one Church; that Church had then mortgaged it to one Rust; that Rust had thereupon assigned the mortgage, without consideration to the plaintiff; that Church had then reconveyed the property, without consideration, to Mrs. Caldwell as trustee; that the moneys secured by the mortgage were, in fact, loaned, not by Rust but by the plaintiff, and were, in fact, received, not by Church, but by Mrs. Caldwell; that the full sum as stated, was at no time advanced upon the mortgage, and that the plaintiff was at all times cognizant of the purpose and design of the trustee. The notice of motion also prayed "for such other and further relief as to the Court may seem just;" and the order, which was made and entered against the plaintiff's objection, directed that the substituted trustee should "be brought in" as, and made a party defendant to, the action; that the summons, complaint and the notice of the pendency of the action be amended accordingly, and that such amendment be without prejudice to the rights of the parties and the proceedings already had, except that the right of the new defendant to service of the summons and complaint upon him, and to defend the action, should in no sense be held impaired. From the order the plaintiff has taken this appeal.

It was urged in the plaintiff's behalf that the application of the substituted trustee should not be granted because of the former trustee's retention of the avails of the mortgage. The tenability of this plea is at least questionable. Wetmore *v.* Porter, 92 *N. Y.* 76. Hence, the proposed defense to the mortgage was not, upon the motion, to be disposed of upon its merits. Johnston *v.* Donvan, 106 *N. Y.* 269-271.

We are, however, of the opinion that the order was erroneous, in that it directed the new trustee to be *added* as a party defendant and not *substituted* in the place and stead of the former trustee and defendant. Had the latter

course been pursued no amendment of the notice of the pendency of the action would have been requisite (*Code Civ. Pro.*, §§ 1632, 1670), as the substituted defendant would have taken the place of the former defendant *cum onere.* Hegewish *v.* Silver, 140 *N. Y.* 414. Nor would the substituted defendant be entitled to service upon himself of the summons and complaint, or to defend the action, notwithstanding the default in pleading of his predecessor in interest, as a matter of right. If the default was in furtherance of the alleged scheme to incumber and sell the property the substituted trustee's right to relief would seem to be enforceable only by an appropriate action.

The facts do not present a case within the purview of sections 452–453 of the Code of Civil Procedure. Those sections provide for the bringing in of a new party by amendment or supplemental summons and complaint whenever it appears that a complete determination of the controversy cannot be had without his presence, or the proposed new party has an interest in the subject of the action, or in real property, the title to which may be in any manner affected by the judgment; but they comprehend only such cases wherein it appears that the interest of the proposed new party in the controversy or the subject of the action, or the real property, the title to which may be affected by the judgment, was held by him at the inception of the action, and was not then exclusively represented by one who was made a party. In other words, those sections have reference to persons who were necessary or proper parties from the beginning of the action (Osterhoudt *v.* Board of Supervisors of Ulster Co., 98 *N. Y.* 239; *Pomery's Remedies & Remedial Rights*, §§ 415, 422); and such were the persons brought in as parties in the cases cited by the respondent's counsel. Johnston *v.* Donvan, 106 *N. Y.* 269; Rosenberg *v.* Salomon, 144 *N. Y.* 92.

The case presented is, moreover, one of a devolution of

interest during the pendency of the action, and sections 452 and 453 of the Code would have no application. The scheme of the Code comprehends distinct provisions for bringing in additional parties, or substituting parties: the one embraced within sections 452 and 453, which apply only to cases in which at the beginning of the action parties sought to be brought in were either necessary or proper parties; the other embraced within sections 755–760, which apply to the bringing in of parties either by substitution or addition, upon whom has devolved during the pendency of the action the rights and interests of a party or parties already joined in the action. The former may have given them all the rights of original parties, including that of original pleading; but the latter take up the action and become parties at the point upon which the interest devolved upon them, and from that point continue the action, except as to supplemental matters, with the same burdens and in the place and stead of their predecessors in interest. And, indeed, it is proper for the due administration of justice that such should be the case, otherwise the delay of judicial proceedings would be incalculable.

In the case at bar the substituted trustee's interest in the controversy, the subject of the action and the real property, the title to which will be affected by the judgment, was exclusively held and represented, at the inception of the action, and the time when the notice of its pendency was filed, by the defendant Caldwell, as trustee. In so far as that interest was concerned, all the necessary and proper parties to enable the Court to completely determine the controversy were then present. For obvious reasons, the substituted trustee was not then a possible party.

The action could not abate by any event (*Code Civ. Pro.*, § 755), but relief might have been extended in this action to the new trustee under sections 756 and 760 of

the Code of Civil Procedure, as indicated. The sections last alluded to, where the application is made by the person to be substituted or joined, authorize the substitution in the place of a party, of a person who, *pendente lite*, has succeeded to the entire interest of such party, or upon whom the entire liability of the latter has devolved; and the *joinder*, with a party of one who, *pendente lite*, has only partly succeeded to the interest of such party, or upon whom the latter's liability has only partly devolved; by amendment of the pleadings, or otherwise as the case requires. Had this course been adopted in the present action no question could have arisen with regard to the default in pleading of the new trustee's predecessor in interest. The new trustee having succeeded to the entire interest of the trustee, defendant might well, under his prayer for general relief (People *v.* Nostrand, 46 *N. Y.* 375; Van Slyke *v.* Hyatt, *id.* 259) have been substituted as a party in the latter's place and stead, and relieved from the default in pleading. Upon such substitution the action would have continued from the point to which it had progressed at the time, and the substituted defendant would, without further relief, have been bound by his predecessor's default in pleading. Moore *v.* Hamilton, 44 *N. Y.* 666, 672; Thuring *v.* Thuring, 18 *How. Pr.* 458. In view, however, of the duty which the law imposes upon a trustee, to guard the interests committed to him against the collusive and negligent conduct of his predecessor in office, as well as the wrongful acts of others (Cuthbert *v.* Chauvet, 136 *N. Y.* 326), the extension of relief from the default, in the present case, and upon proper terms, would seem to require approval as an act of wise judicial discretion. *Code Civ. Pro.*, § 783.

We may, upon appeal, modify any order, but cannot grant entirely new relief. *Code Civ. Pro.*, § 1317. The order appealed from must, therefore, be reversed, and the motion be directed to be reheard at Special Term. *Ib.*

Costs of this appeal are awarded to the appellant to abide the event of the motion.

All concur.

---

## MICHAEL BOWEN, RESPONDENT, v. MICHAEL SWEENEY AND CATHERINE GALLAGHER, APPELLANTS, IMPLEADED WITH OTHERS.

SUPREME COURT GENERAL TERM, FIRST DEPARTMENT, OCTOBER, 1895.

§§ 970, 1537, 1544, 2653 A.

*Decree of Surrogate's Court, admitting will to probate, binding only as to personalty—action for partition—validity of will may be litigated.*

Under sections 1537 and 2653 A of the Code of Civil Procedure, any person interested in a will which has been admitted to probate in this State may maintain an action to cause the validity thereof to be determined. The decree of the Surrogate's Court admitting the will to probate is binding only as to personalty.

Under this procedure, a will relating to realty and personalty may be declared void because of the insanity of the testator, or for any other cause in respect to one species of property and valid in respect to the other kind of property, upon the ground that the testator was sane, and so there may be two final adjudications, both supposed to be verities, one affirming a will to be valid and the other affirming it to be void.

The provision of section 2653 A of the Code, that "the party sustaining the will shall be entitled to open and close the evidence and argument does not apply to an action brought prior to its enactment.

Under sections 970 and 1544 of the Code, the verdict of the jury upon the trial of one or more issues of fact, is not merely for the information of the Court, but is conclusive until set aside or a new trial granted, and the Special Term, upon its continuation of the

trial, has no power to set aside the verdict and find the facts contrary thereto.

(*Decided October*, 1895.)

Appeal from an order denying a motion to set aside the verdict, from the interlocutory judgment entered on said verdict and on a decision of the Special Term, and from the final judgment entered on the report of a referee to sell in an action of partition

August 27, 1885, Mary T. Hatten died seized in fee simple of a piece of land situate at the northwest corner of First avenue and Thirteenth street, which is 43 feet and 3 inches wide on the avenue and 80 feet long on the street. She left a last will, executed April 17, 1880, by which she devised and bequeathed all of her estate to Michael Sweeney and Catherine Gallagher, to be divided equally between them. The will was admitted to probate October 18, 1886, by the Surrogate's Court of the City and County of New York (3 *N. Y. St. Rep.* 213). August 20, 1887, the decree of the Surrogate's Court was reversed by the General Term of the Supreme Court (10 *N. Y. St. Rep.* 19), which ordered the following issues to be tried before a jury in the Court of Common Pleas:

First. Whether the decedent ever saw the paper propounded for probate as her last will and testament until it was presented to her for execution.

Second. Whether the paper propounded for probate, as the last will and testament of Mary Teresa Hatten, was read by her or any one aloud in her hearing previous to the signing thereof.

Third. Whether the decedent at the time of signing the paper propounded for probate as her last will and testament had full knowledge of the contents of the said paper.

Upon the trial of these issues all were answered in the affirmative by the jury. On the 16th of November, 1888, the proceedings upon the trial were returned to the Sur-

rogate's Court, and on that date a decree was entered confirming the probate of the will. The litigants in this action were parties to the proceedings in the Surrogate's Court and appeared on the trial in the Court of Common Pleas. No appeal was taken from the final decree of November 16, 1888, of the Surrogate's Court. October 10, 1888, this action was begun to partition said real estate, pursuant to section 1537 of the Code of Civil Procedure, upon the theory that the plaintiff was an heir-at-law of Mary T. Hatten, and that her apparent devise of the property to Michael Sweeney and Catherine Gallagher was void.

The contesting defendants, Michael Sweeney, Catherine Gallagher and Francis Gallagher, her husband, denied in their answers that the devise was void, and set up as a bar to the action the final decree of the Surrogate's Court admitting the will to probate. The other defendants who answered admitted the allegations in the complaint.

In November, 1889, the action was tried at Circuit, before a jury, and the following questions submitted:

(1) Did Mary T. Hatten know that the paper she executed was a last will and testament?

(2) Was Mary T. Hatten procured to execute the paper, purporting to be a will, by the conspiracy of Michael Sweeney, Catherine Gallagher and others?

(3) Had Mary T. Hatten capacity to make a will?

The first two questions were answered in the affirmative and the third question in the negative by the jury. Thereafter the trial was concluded at Special Term, the verdict confirmed and a judgment of sale ordered, in accordance with which a judgment was entered September 22, 1890. Upon an appeal to the General Term this judgment was reversed, and a new trial granted, on the grounds that the Circuit erroneously allowed the complaint to be amended, and excluded competent evidence (63 *Hun*, 224).

In March, 1892, the plaintiff, pursuant to leave granted,

served a second amended complaint, and the issues joined thereon were tried at Circuit in June, 1893, and the following questions submitted to the jury:

1. At or immediately after the time when Mary Teresa Hatten signed the said paper writing, dated the 17th day of April, 1880, purporting to be her last will and testament, and mentioned in the complaint herein, did she publish and declare the same to be her last will and testament?

2. Was the said paper writing obtained from said Mary Teresa Hatten by undue influence exercised upon her by the defendants Michael Sweeney, Catherine Gallagher and Francis Gallagher, some or one of them?

3. Was the said paper writing obtained from said Mary Teresa Hatten by a conspiracy entered into by the defendants Michael Sweeney and Catherine Gallagher and some other person or persons for the purpose of fraudulently procuring a will in favor of said Michael Sweeney and Catherine Gallagher, in pursuance of which conspiracy they procured the said paper writing to be signed by the said Mary Teresa Hatten?

4. Was the said testatrix, Mary Teresa Hatten, at the time she executed said paper writing of sound mind?

5. Is or is not the said paper writing, executed by the said Mary Teresa Hatten the last will of the said testatrix?

The first question was answered in the affirmative by the direction of the Court, the second and third, in the affirmative, by the jury, and the fourth and fifth, in the negative, by the jury. Upon the rendition of the verdict a motion was made in behalf of Michael Sweeney and Catherine Gallagher to set it aside, which was denied, and an order entered. Thereafter the trial was continued at Special Term, by which the verdict was confirmed and a decision rendered directing an interlocutory judgment, which was entered July 13, 1893, adjudging that the property be sold. By the interlocutory judgment

it is adjudged that the plaintiff is entitled to one-fourth of the premises; Thomas Bowen, defendant, Michael Bowen, Fanny McQueeny, one-twelfth each; Patrick Ford, Francis Ford, Michael Ford, Thomas Ford, one-sixteenth each; Mary Ann Cane and Catherine Ward, one-eighth each.

In June, 1894, a motion for a new trial was made on the judgment roll and a case at General Term in behalf of Sweeney and Gallagher for a new trial. The motion was dismissed for want of jurisdiction (79 *Hun*, 614), and an order entered which was affirmed by the Court of Appeals (143 *N. Y.* 349). February 7, 1895, the property was sold, pursuant to the interlocutory judgment, for $51,000, and on filing the report of sale a final judgment was, March 4, 1895, entered.

*William H. Arnoux*, for appellants.

*Flamen B. Candler*, for plaintiff, respondent.

*S. B. Chittenden* and *William J. Kelly*, for certain defendants, respondents.

FOLLETT, J.—As all of the litigants assume that Mary T. Hatten died seized in fee simple of the whole of the premises, we shall rest our judgment on that assumption, without considering its validity.

All of the litigants in this action were parties to the proceedings in the Surrogate's Court to probate the will, to the appeal to the General Term and to the trial before the Common Pleas. The first question presented is whether the decree of the Surrogate's Court, affirming the original probate, entered on the verdict rendered in the Court of Common Pleas, is a bar to this action? At common law the probate of a will in an Ecclesiastical Court was not conclusive against the heir, and a judgment in an action at law,

at the suit of the heir, that the testator was incapable of making a will, was not conclusive against the executor as to the personalty, who, notwithstanding the judgment at law respecting the realty, might, if he could, establish the will as to the personalty in an Ecclesiastical Court. Montgomery *v.* Clark, 2 *Atk.* 378; Hume *v.* Burton, 1 *Ridg. P. C.* 277; Bogardus *v.* Clarke, 1 *Edw. Ch.* 266; 4 *Paige*, 623. Lord Hardwicke said, in Montgomery's case: "I have often thought it a very great absurdity that a will which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated upon paper depositions only in the Ecclesiastical Court, because they have a jurisdiction on account of the personal estate disposed of by it." By chapter 77, 20 and 21 Victoria (1857), the rule of the common law has been changed in England, and a decree of a Probate Court admitting a will to probate, which relates to realty and personalty, is binding on the heir in case he had notice. § 62, chap. 77, 97, *Pick. Stat. at Large*, 420–437. The rule of the common law arose from its tenderness to heirs and from the idea that none should be deprived of land except by a judgment of a Court of law after trial of the issues of fact before a jury. Under the first Constitution of this State wills relating to realty might be proved in the Court of Common Pleas (1 *R. L.*, 1801, 178), and after 1813 in the Supreme Court or in the Court of Common Pleas (1 *R. L.*, 1813, 364), and Surrogates had the power to admit to probate wills relating to personalty and to real estate so far as it was necessary to authorize the issuing of letters testamentary. 1 *R. L.*, 1801, 317; 1 *R. L.*, 1813, 444. Persons aggrieved by any decree of a Surrogate were authorized to appeal to the Court of Probates. 1 *R. L.*, 1801, 325; 1 *R. L.*, 1813, 454. Under the second Constitution the Court of Probates was abolished, and persons aggrieved by the decree of a Surrogate were

authorized to appeal to the Chancellor. Chap 70, L. 1823. But the Court of Chancery could not by its decree bind the heir in respect to the validity of a will unless the question of fact had been determined in a Court of law on the issue *devisavit vel non*—an issue directed by a Court of equity to be tried by a jury in a Court of law to determine the validity of a will. Rogers *v*. Rogers, 3 *Wend.* 505. Vanderheyden *v*. Reid, 1 *Hopk.* 408, was an appeal from a Surrogate's decree admitting a will to probate, which related to real and personal property, and turned upon the question of the sanity of the testator. The question arose as to whether this issue could be sent by the Court of Chancery to a Court of law to be determined by a jury. In discussing this questiou the learned Chancellor said: "Thus, a will of personal and real estate may be there adjudged both valid and void, by different tribunals. This result of an artificial division of jurisdictions can never be proper, where it may be avoided. That a will should be adjudged valid, because the testator who made it was of sound mind, and that the same will should be adjudged void, because the same testator was insane, is a result which should never take place under one system of laws. But still more singular would be the anomaly, if the same Court were, in the case of a contested will of real and personal estate, bound to send the disputed question to a jury, in respect to the land, and also bound to decide the same disputed question, without a jury, in reference to another species of property.

"Such an incongruity is avoided by taking one course of investigation, whether the will is of real or of personal estate, or of both comprised in one instrument. This court now having jurisdiction of wills of personal goods, and also of wills of land, it may most fitly apply the same method of investigating facts, to both cases."

This language seems to indicate that the Chancellor was of the opinion that a decree entered upon the verdict

would be conclusive upon the heir. This judgment was, however, reversed (5 *Cow.* 719); but not upon the point discussed in the foregoing quotation.

In Brick's Estate (15 *Abb. Pr.* 12) and in 1 *E. D. Smith's Rep.* XVII., will be found a learned and instructive history of the Probate Courts of this State, prior to the Revised Statutes, by Charles P. Daly, the accomplished Chief Judge of the Court of Common Pleas.

Under the Revised Statutes wills of real and personal property, or both, were provable before the Surrogate of the proper county (2 *R. S.* 57, § 7; *id.* 60, § 23). Any person deeming himself aggrieved by the decree of a Surrogate was authorized to appeal to the Circuit Judge of the Circuit (2 *R. S.* 66, § 55), who, in a case of a reversal upon a question of fact was required to formulate issues of fact and order them tried before a jury (§ 57), which were to be tried in the same manner as issues awarded by the Court of Chancery, and new trials could be granted by the Supreme Court (§ 58). By section 59 (2 *R. S.* 67) it was provided: "The final determination of such issues shall be conclusive as to the facts therein controverted *in respect to wills of personal estate only*, upon the parties to the proceedings." In case the decree of the Surrogate was affirmed or was reversed on questions of law, by the Circuit Judge, an appeal could be taken to the Court of Chancery (2 *R. S.* 609, §§ 97, 100). Under these statutes it is clear that a judgment entered on a verdict, establishing a will, after a trial of issues of fact before the Circuit, was not conclusive upon the heir, to whom the right remained to contest the validity of the devise in an action of ejectment, and by chapter 238, L. 1853, he was authorized to contest the validity of a devise by an action in partition.

Under the Constitution of 1846 the statute authorizing an appeal to a Circuit Judge was changed and an appeal was authorized to be taken to the Supreme Court, and, in

case the decision of the Surrogate was reversed upon a question of fact, the questions were directed to be tried before a jury (§ 12, chap. 280, L. 1847). The statutes remained in this condition until the adoption of the Code of Civil Procedure, by which the Surrogate's Court is made a court of record and is vested with the power to probate wills relating to realty and personalty. By section 2626, Code of Civil Procedure, the decree admitting a will to probate is conclusive as to the personalty, unless it is reversed on appeal or revoked by the Surrogate; but the decree is not conclusive upon the heir, but is presumptive evidence only of the validity of the devise. *Code Civ. Pro.*, § 2627. When an appeal is taken to the Supreme Court it may affirm or reverse the decree, and, if modified or reversed upon a question of fact, a trial before a jury of the issues of fact must be awarded. The provision of the Revised Statutes, that the decision to be entered upon the issue so awarded, shall be conclusive as to the personalty only, is not continued by this Code, nor do we find any provision stating the effect of a judgment so rendered.

By section 1537 of the Code of Civil Procedure the provisions of chapter 238, L. 1853, were continued in force, and an heir of a devisor is authorized to maintain an action for the partition of land apparently devised to another upon the ground that the devise is void. In addition to these provisions any person interested in a will which has been admitted to probate in this State may maintain an action to cause the validity thereof to be determined. *Code Civ. Pro.*, § 2653 A, enacted in 1892; Long *v.* Rogers, 79 *Hun*, 441. It is apparent that under our boasted reformed procedure a will relating to realty and personalty may be declared void because of the insanity of the testator, or for any other cause, in respect to one species of property and valid in respect to the other kind of property, upon the ground that the testator was sane,

and so there may be two final adjudications, both supposed to be verities, one affirming a will to be valid and the other affirming it to be void. And in case a will relating to realty and personalty is admitted to probate in the Surrogate's Court and the decision is reversed by the Supreme Court and the issues are tried before a jury, which are found in favor of the validity of the will, upon which an adjudication is entered by the Surrogate's Court decreeing the probate to be valid, the heir may, notwithstanding, retry the question as to the realty, and possibly, as in the case at bar, obtain a verdict and a judgment that the will is invalid. But the remedy for this incongruous and absurd procedure by which judgments diametrically opposed to each other may be recovered in respect to the same will, does not lie with the Courts, but with the Legislature. We are compelled to hold that the decree entered upon the verdict of the jury in the Court of Common Pleas is not a bar to this action.

This action was not brought under section 2653 A, Code of Civil Procedure, enacted in 1892, but was brought four years prior to its enactment, under section 1537 of the Code, and the provision of section 2653 A, that "the party sustaining the will shall be entitled to open and close the evidence and argument," is not applicable to this case, and the Court did not err in denying the appellants' motion to be given the right to open and close the case.

It is urged that the Court erred in refusing to direct the jury to find the second, third, fourth and fifth issues of fact in favor of the contesting defendants. Upon reading the evidence, we are of the opinion that it required the Court to submit every one of these issues to the jury, and that no error was committed in refusing to direct a verdict, or in denying a motion for a new trial on the ground that it was contrary to the evidence. The learned trial Judge instructed the jury fully and carefully in respect to the law relating to the issues submitted, and it

was not error after the delivery of his charge to refuse to reinstruct the jury on these issues in the language of counsel as expressed in nearly fifty requests. The ninth and tenth requests, at folios 1020 and 1021, are typical of all. By these requests the Court was asked to instruct the jury in respect to the rules of law relating to undue influence, which requests were declined. The Court had already carefully instructed the jury upon this issue at folios 966 *et seq.*, and it was not error to refuse to reinstruct the jury on the same subject in the language of counsel. Under sections 970 and 1544 of the Code of Civil Procedure, the verdict of the jury was not merely for the information of the Court, but was conclusive until set aside or a new trial granted, and the Special Term, upon its continuation of the trial, had no power to set aside the verdict and find the facts contrary thereto. Jones *v.* Jones, 120 *N. Y.* 589. Our attention is called to thirteen exceptions to the admission and exclusion of evidence in the appellants' twelfth point. To discuss each one of them and show why they were not well taken would unnecessarily prolong this opinion, and it is, we think, sufficient to say that none of them calls for the reversal of this judgment, entered upon the conclusion of a prolonged and carefully conducted trial.

The judgments and order should be affirmed, with costs.

All concur.

## MITCHELL v. PIQUA CLUB ASSOCIATION *et al.*

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW YORK COUNTY, NOVEMBER, 1895.

§ 1260.

*Satisfaction of judgment by attorney whose authority has been revoked.*

**A satisfaction of a judgment executed by an attorney of record, whose authority has been revoked, is not conclusive against the person entitled to enforce the judgment in respect to a person who had actual notice of the revocation before a payment on the judgment was made, or a purchase of property bound thereby was effected.**

(*Decided November*, 1895.)

Motion to cancel satisfactions of judgments executed by attorneys of record, on the ground that their authority had been revoked.

*George A. Baker*, for the motion.

BEEKMAN, J.—It seems to me quite plain that the attorneys of record, who assumed to collect the judgments and to execute satisfaction pieces therefor, had no authority to do so. After the judgments were recovered, there was a consent given by them for the substitution of Mr. Baker as attorney for the judgment creditors, upon which an order to that effect was entered. I assumed that these consents were also signed by the judgment creditors themselves, in accordance with the practice in such cases. While it may be doubted whether any order of substitution was necessary, in view of the fact that the relation of attorney and client to a large extent ceases upon the

entry of the final judgment, the action which was thus taken certainly operated to revoke the authority which the attorneys of record theretofore possessed to satisfy the judgments upon payment under section 1260 of the Code of Civil Procedure. That section, while conferring such power for a period of two years after rendition of judgment, expressly provides that where the authority has been revoked, a satisfaction by the attorney is not conclusive against the person entitled to enforce the judgment in respect to a person who had actual notice of the revocation before a payment on the judgment was made or a purchase of property bound thereby was effected. In the cases before me, the receiver had actual notice of the substitution, and therefore of the revocation of the authority of the former attorneys of record to receive the money and to satisfy the judgments. It follows, therefore, that the motion made to cancel the satisfactions of these judgments should be granted, unless the difference between the amount which the substituted attorney has actually received from the former attorneys of record and the amount due on the judgments irrespective of such payments is paid to the present attorney within a time which will be fixed in the order. In respect to the judgments rendered in the cases in which Mr. Baker was attorney of record, it is also clear that his lien for his fees has been disregarded. He gave notice of such lien to the receiver, and was therefore entitled to have it respected. In place of this, the judgments in question were, without kis knowledge, paid to the judgment creditor, who has satisfied the same. As the evidence shows that the latter is insolvent, the right of the attorney to have the satisfactions set aside seems clear, under the authority of the case of Commercial Tel. Co. *v.* Smith, 57 *Hun*, 176. It will, therefore, be so ordered. If there is any question in respect to the amount of the attorney's lien, it may be

settled by a reference. It is proper to say that no imputation of bad faith rests upon the receiver, but that his action in these matters was the result of inadvertence. Motion granted, with $10 costs.

---

## PEOPLE *ex rel.* POND *v.* TAMSEN, SHERIFF.

SUPREME COURT, SPECIAL TERM, CHAMBERS, NEW YORK COUNTY, DECEMBER, 1895.

§§ 14, 1241, 2280.

*Contempt—warrant of attachment need not recite the proceedings upon which it rests.*

**A warrant of attachment, under which a person is held to answer for a contempt, need not recite the contempt or any of the proceedings upon which the warrant rests, nor is it the practice to insert such recitals in the warrant. At best, it would not be a jurisdictional defect, and for that reason, if there were no other, the Court will refuse to review the mandate of another Court of general jurisdiction on *habeas corpus*.**

(*Decided December*, 1895.)

Application for dismissal of warrant of attachment on the ground that it does not recite the proceedings on which the warrant rests.

*John Fennel*, for relator.

*John R. Abney* and *Jacob H. Shaffer*, opposed.

BEEKMAN, J.—The Court of Common Pleas had jurisdiction to issue the warrant of attachment under which the relator is held to answer for an alleged contempt. The objection to the form of the attachment, that it does

not recite the contempt or any of the proceedings upon which the warrant rests, is untenable. The relator, it must be assumed, for it is not denied, was served with a copy of the affidavit upon which the warrant was issued, and he was, therefore, sufficiently apprised of the nature of the charge made against him. The cases cited by counsel for the relator are not applicable. They relate to final commitments. Seaman *v.* Duryea, 11 *N. Y.* 324; Dunford *v.* Weaver, 84 *N. Y.* 452. The warrant in question is merely process by which the relator is brought into Court to answer a charge. He is then fully apprised of the charge and admitted to make a defense, if he has any. § 2280, *Code of Civil Procedure.* There is nothing in the Code which requires any recitals in the warrant, nor is it understood to be the practice to insert them in such cases. At best it was not a jurisdictional defect, and for that reason, if there were no other, the Court will refuse to review the mandate of another Court of general jurisdiction on *habeas corpus.* Park *v.* Park, 80 *N. Y.* 156. A further objection made by the relator is that the judgment he is accused of disobeying can be enforced by execution, and that, under subdivision 3 of section 14 of the Code, he cannot therefore be held to answer for a contempt. This should be addressed to the Court of Common Pleas. The answer, however, is complete. Section 1241 of the Code, subdivision 4, provides that a person disobeying a judgment of the Court which requires the payment of money into Court, or to an officer of the Court, except where it is due upon contract, express or implied, or as damages for non-performance of a contract, may be punished for a contempt. The case before me comes within the section and is not one of the excepted cases. Gildersleeve *v.* Lester, 68 *Hun,* 535, affirmed 139 *N. Y.* 608.

The writ of *habeas corpus* is therefore dismissed, and the relator remanded to the custody of the sheriff.

## LILLIE H. GILBERT *v.* CECELIA McKENNA *et al.*

NEW YORK SUPERIOR COURT, GENERAL TERM, DECEMBER, 1895.

§ 522.

*Foreclosure—motion to strike off cause for want of reply to counterclaim.*

In an action to foreclose a mortgage, a motion made to strike off the cause for want of a reply to a counterclaim contained in the answer will be denied.

(*Decided December*, 1895.)

Appeal by Dempsey and Smith, two of the defendants, from order made at Special Term denying motion to strike cause from calendar.

*Blandy, Mooney & Shipman*, for appellants.

*James Kearney*, for respondent.

McADAM, J.—The action is to foreclose a mortgage on real property. The appellants were made parties defendants, on the ground that they had or claimed to have some interest in or lien upon the mortgaged premises subordinate to that held by plaintiff. They joined issue by an answer setting up an agreement made with the owner of the fee for a mortgage which was to be prior to the one sought to be foreclosed.

When the action was called for trial, the appellants moved to strike the cause from the calendar, because of the failure of the plaintiff to serve a reply to the new matter pleaded by them. This was upon the erroneous theory that the cause was not at issue. The motion was

denied, and from the order entered on such denial the present appeal is taken.

The appellants have misconceived the practice. No order had been made requiring a reply to the new matter, and it was optional with the plaintiff to serve one. If without an order a reply was proper, the only effect of a failure to make it was to render unnecessary proof of the facts which should have been met by reply. *Code*, § 522; *Bliss' Code Pl.* § 396; Randolph *v.* Mayer, 53 *How. Pr.* 68; 2 *Wait's Pr.* 443, 444. The failure does not prevent a plaintiff from bringing the cause to trial, and the effect of the omission is properly determinable thereat. Adams *v.* Roberts, 1 *Civ. Pro. R.* 204; s. c., 62 *How. Pr.* 253.

Irrespective of the question whether the answer contains a counterclaim requiring a reply, the refusal to strike the cause from the calendar was proper, and the order entered upon such refusal must be affirmed, with costs.

FREEDMAN, P. J., concurs.

---

## GEORGE LEWIS PRENTISS *v.* ELLEN BOWDEN.

NEW YORK SUPERIOR COURT, GENERAL TERM, OCTOBER, 1895.

§ 1200.

*Entry of judgment waives right to appeal from judgment.*

The defendant, the prevailing party in an action, is awarded the costs of the Court of last resort, and those alone; enters judgment for such costs, which was satisfied; and the appeals from so much of the order as denied her the costs of the Court below. *Held*, that by the entry of the judgment and its satisfaction, the de-

fendant waived the right to appeal from the order directing the entry of the judgment.

(*Decided October*, 1895.)

Motion by plaintiff to dismiss appeal from order.

*G. F. Bentley* and *W. R. Wilder*, for motion.

*B. Patterson*, opposed.

McAdam, J.—Upon filing the *remittitur* from the Court of Appeals, the question arose whether the defendant, the party finally successful, was entitled to costs in that or all the Courts. The Special Term Judge decided that as the suit was in equity, and no costs had been awarded by the trial Judge, the prevailing party was entitled to the costs of the Court of final resort and to those alone. The defendant acted upon the order and entered judgment for such costs, aggregating $116.23, which were paid; and about the same time appealed from so much of the order as denied her the costs of the Court below.

The plaintiff now moves to dismiss the appeal upon the ground that, by the entry of the judgment and its satisfaction, the defendant waived the right to appeal from the order directing the entry of the judgment.

The judgment to be entered on the *remittitur* was in its nature final—one from which no appeal could be taken; for it directed judgment absolute against the plaintiff on his stipulation; and the costs to which the defendant was entitled were those recoverable only upon such a judgment. When the defendant entered that judgment she concluded herself by it; her power to appeal from or enlarge it was gone, and its satisfaction discharged all obligations which could flow from it.

The appeal taken by defendant from the order as to the amount of costs to which she was entitled is inconsist-

ent with the entry of such judgment; for if part of the order which was appealed from were reversed she could not enter another judgment for the costs which she claims were wrongfully disallowed. Such costs could not be interlocutory, but those which follow a final judgment go into the judgment and form an indivisible part of it. An order granting an extra allowance must therefore be made before judgment, "for the costs enter into and form part thereof." Clarke *v.* City, 34 *N. Y.*, at p. 356.

A judgment is "the final determination of the rights of parties in the action." *Code*, § 1200; and see Patten *v.* Stitt, 50 *N. Y.* 591; *In re* Braiser, 2 *How. Pr. N. S.* 154; Wilkins *v.* Raplee, 52 *N. Y.* 248; Smith *v.* Dittenhoefer, 1 *City Ct. R.* 143. There can be but one judgment in the action (Canfield *v.* Gayland, 12 *Wend.* 236; Johnson *v.* Farrell, 10 *Abb. Pr.* 384; Board of Underwriters *v.* Nat. Bank, 146 *N. Y.* 64), and that the one authorized by the *remittitur* (Gregor *v.* Buell, 17 *Abb. Pr.* 31). In some cases the judgment contains several provisions; here there was but one.

The defendant had the undoubted right to appeal from any part of the order; but if she expected to obtain thereby a more favorable allowance of costs she should have refrained from entering judgment until the question of costs had been finally determined, to the end that all to which she was entitled might form part of it, once for all time. She could not enter more than one judgment on the *remittitur*. There is no accommodating practice which permits the entry of such judgments on the installment plan.

There was but one subject before the Court below, and that was the amount of costs to which the defendant was entitled under the *remittitur*. It was not a question involving independent causes of action or disconnected rights. There could be but one bill of costs taxed under

the *remittitur*, and the fact that items were claimed in the several Courts or on different appeals did not divide the matter into so many distinct controversies involving the right to as many independent appeals. On the contrary, the relief sought by the appeal is predicated upon and indissolubly connected with that which had been already awarded and enforced. Bennett *v.* Van Syckel, 18 *N. Y.* 481; Genet *v.* Davenport, 59 *id.* 548. In short, the acts of the defendant were not the assertion of concurrent rights, but were so inconsistent that the election to assert the one amounts in law to a renunciation and waiver of the other. See *Baylies on N. T. and Appeals*, 18, 19.

The cases relied on by the defendant relate to independent causes of action or grounds for relief, and are inapplicable.

It follows that the plaintiff's motion must be granted and the appeal dismissed, with costs.

FREEDMAN, P. J., concurs.

---

## WILLIAM F. COCHRAN, RESPONDENT, *v.* LORENZ REICH, APPELLANT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT, DECEMBER, 1895.

§ 522.

***Pleading and proof—non-payment as a necessary element of plaintiff's cause of action and payment as an affirmative defense.***

**Where a general denial is interposed, proof by the plaintiff of every allegation essential to his cause of action is required. Where it is necessary to allege demand and non-payment, proof must be**

given of such allegations. In actions, however, where allegations, such as demand and non-payment, are not essential to the plaintiff's cause of action, payment is an affirmative defense, and, to be proved, must be specially pleaded, a general denial not being sufficient to admit of such proof.

The general rule of pleading under the Code is, that a defendant by a general denial puts in issue every fact which it is necessary and material for the plaintiff to allege to constitute his cause of action; and where non-payment of rent is a necessary and material fact to be alleged in the complaint to constitute plaintiff's cause of action, it follows that a general denial of such allegation puts in issue the fact of non-payment, upon an issue thus raised, the burden is on the plaintiff to prove the facts necessary and material to his cause of action.

(*Decided December*, 1895.)

Appeal from judgment entered upon a verdict directed by the Court.

*Delos McCurdy*, of counsel, for appellant.

*Treadwell Cleveland*, of counsel, for respondent.

O'Brien, J.—The questions presented upon this appeal relate to pleadings and proof. The first cause of action is for breach of a covenant to pay rent reserved in a lease. The breach alleged is the refusal to pay rent after demand made therefor, that the said several sums (of rent) and each of them now remain wholly due and unpaid, although payment thereof has been duly demanded. The answer contains a general denial. No evidence was offered by plaintiff showing or tending to show that the rent alleged to be "wholly due and unpaid" was unpaid in whole or in part. In the absence of such proof, and against the contention of the defendant that the burden of showing non-payment was upon the plaintiff, the Court directed a verdict in plaintiff's favor.

Upon this cause of action the precise question presented on this appeal is as to whether, in a case where

non-payment of rent is alleged in the complaint as a material and necessary part of the plaintiff's cause of action, a general denial of the allegations of the complaint puts in issue the fact of non-payment. It is conceded that it was necessary in the complaint to allege non-payment, because such constituted a breach of the lease or contract sued upon. As said in Lent *v.* The N. Y. & M. R. Co., 130 *N. Y.* 510: "It does not admit of controversy that upon an ordinary contract for the payment of money non-payment is a fact which constitutes a breach of the contract and is the essence of a cause of action, and, being such within the rule of the Code, it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial."

In that case a demurrer was interposed to the complaint which omitted to allege non-payment in an action upon an indebtedness; and it was therein directly held that such an allegation was essential, and that for failure to allege it the complaint was demurrable. In disposing of this question, however, we find some remarks *obiter* which would seem to support the course pursued by the plaintiff upon the trial, of not offering any proof upon the question of non-payment. Thus (p. 513) it is stated: "It cannot be said that where the breach consists in non-payment of an agreed sum that it is not an issuable fact because payment cannot be proven under a general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent the rule that payment must be pleaded must be deemed to modify the rule of pleading under the Code in reference to a general denial." The second sentence of this quotation is open to the construction that although it is necessary to plead the fact of non-payment in actions of this character, such fact is not put in issue by a general denial, and therefore

that it requires no proof because it is to be taken as admitted. The learned Judge writing the opinion in that case quotes with approval from McKyring *v.* Bull, 16 *N. Y.* 297. There the complaint alleged that the plaintiff did labor and service for and at the request of the defendant, which was worth $650, and concluded with an averment that there was due the plaintiff on account of such service, over and above all payments and set-offs, $134, and demanded judgment for that sum with interest. The answer consisted only of a general denial of all the allegations of the complaint. *Held*, that evidence of payment as a defense to the action, or a partial payment in mitigation, was inadmissible on the trial because neither was pleaded. That is a most instructive case, because we therein find a very learned review of the history of the rule at common law under the old forms of pleading. The precise question, however, there presented was as to what could be proven by the defendant under a general denial, and SELDEN, J., in closing the opinion of the Court, says: "My conclusion, therefore, is that section 149 (old Code) should be so construed as to require the defendants in all cases to plead any new matter constituting an entire or partial defense, and to prohibit them from giving such new matter in evidence upon the assessment of damages when not set up in the answer."

Although in both of the cases above cited expressions may be found in the opinions favoring the position taken by the plaintiff upon the trial, neither of them was called upon to decide, nor do they decide the precise question here presented, which is, was the plaintiff as part of his first cause of action obliged to prove his necessary allegation of non-payment? If it was material to allege the breach, such being denied, it would logically seem necessary to prove it, if we are to be governed by the fundamental rule that the judgment in every case shall be *secundum allegata et probata*.

It is insisted, however, that whatever the general or logical force of pleadings, and though the result which has been reached in this case may be deemed an anomaly under the Code pleading, the rule has been settled in the Court of Appeals by the case of Lent *v.* The N. Y. & M. R. Co. (*supra*). Although this case, as we have seen from the quotation made, does bring some comfort to the respondent, it is not entirely barren of argument to support the appellant's position. Thus, in the next paragraph of the opinion following the one already quoted, it is said: "But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action and *essential to be proved* to entitle the plaintiff to a judgment. Such facts under the Code must be pleaded. No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation."

As neither of these cases, therefore, is a decisive authority on the question involved, we must look further. In Quin *v.* Lloyd, 41 *N. Y.* 349, the complaint alleged an amount of indebtedness for services performed without stating the value of such services of their extent, but claimed that the indebtedness was "for the balance remaining due after sundry payments made by the defendant;" and the answer was merely a denial of the allegations of the complaint. *Held*, that on the trial the defendant was, under these pleadings, entitled to prove the payment to the plaintiff on account of the services alleged. We therein find that the case of McKyring *v.* Bull (*supra*), upon which that of Lent *v.* N. Y. & M. R. Co. was based, was commented upon and distinguished.

The case of Locklin *v.* Moore, 57 *N. Y.* 360, might at first blush be regarded as an authority in respondent's favor. That was an action brought to recover the purchase price of goods sold. The answer, among other things, set up that it was expressly agreed that they

should be paid for at defendant's store; that he had always been ready and willing to pay for them at his store, but that plaintiff had never demanded payment thereof. That such was the agreement the referee found as a fact, but as a conclusion of law he found that a demand at defendant's store by plaintiff before the commencement of the action was unnecessary, and that the commencement of the suit was a sufficient demand. In supporting this ruling of the referee, the Court say: "It is the settled law of this State, announced in many decisions, that when a specific sum of money is made payable by the agreement of the parties on demand, or at a specified time, at a particular place, as against the original debtor, no demand at the time or place prior to the commencement of the suit is necessary. Commencement of a suit is itself a sufficient demand. * * * The only benefit the defendant could get from the specification of payment at a particular place is, that if he was ready there to pay, and kept ready, he could set that fact up in his answer, and then pay the money into Court, and allege such payment in his answer, and thus shield himself from all liability for interest and costs."

Contrasting the case last cited with that of Lent *v.* N. Y. & M. R. Co. (*supra*), it will be found that the Lent case is authority for the proposition that in an action upon an alleged indebtedness an allegation in the complaint of non-payment is essential; while the Locklin case is authority for the proposition that "when a specific sum of money is made payable by the agreement of the parties upon demand, at a specified time, at a particular place, as against the original debtor, no demand at the time or place prior to the commencement of the suit is necessary; commencement of the suit is itself a sufficient demand." This latter case we do not regard as controlling, because we think there is a plain distinction between an allegation of demand and one of non-payment. Thus, though

it may not be necessary, as held in the Locklin case, to allege a demand, it has been held in the Lent case necessary to allege non-payment. These two, demand and non-payment, seem to us separable, and while Locklin *v.* Moore is controlling in a like case upon the question of demand, it still follows logically that where non-payment is an essential allegation of plaintiff's cause of action, it should be proved.

In Knapp *v.* Roche, 94 *N. Y.* 239, it was held that where a complaint contains an allegation of non-payment as a necessary and material fact to constitute the cause of action, proof of payment is admissible under a general denial in the answer; and the rule is thus stated in the opinion: "While it is generally true that a defense of payment is inadmissible under a general denial, this is not so when the fact of non-payment is alleged in the complaint as a necessary and material fact to constitute a cause of action (citing cases). It is always competent to prove under a general denial any fact tending to controvert the material affirmative allegations of a complaint."

These cases do not meet the precise question under discussion, being authorities only upon the point as to what defenses must be pleaded to be available; and the rule deducible from them is correctly stated in Baylies' Code Pleadings and Forms (p. 235), as follows: "A defense which confesses and avoids a cause of action cannot be given in evidence under an answer containing simply a general denial of the allegations of the complaint. Such defenses must be pleaded to authorize evidence thereof to be given on the trial. * * * The cases are uniform that under a general denial the defendant cannot prove a defense founded upon new matter. A defendant who relies upon payment as a defense must plead it, even though the complaint alleges non-payment, unless such allegation is necessary and material to the statement of a cause of action." And in Bliss on Code Pleading (p. ), refer-

ring to the plea of payment, it is said: "The plea of payment is new matter. The claim is plausible that inasmuch as no cause of action can arise upon a contract without its breach, inasmuch as the breach—as non-payment—must be alleged, it becomes part of the plaintiff's case and is involved in a general denial. But whether in an agreement, as to pay money, it is incumbent upon the defendant to plead the fact of payment as new matter should upon principle depend upon the necessity of showing the fact of non-payment as part of the plaintiff's case. If he is bound to prove in the first instance that the promissory note has not been satisfied, or that the price for or value of the work and labor of the property sold has not been paid, then the default should be so affirmatively stated that the issue may be taken upon it, and the fact of payment does not become new matter. If, on the other hand, is is sufficient for him in making his *prima facie* case to establish the agreement or the work or sale, with the price or its value, and if the obligation thereby created has been discharged—as by payment—it becomes the duty of the defendant to prove that fact, then such fact is new matter to be specially pleaded."

The general rule of pleading under the Code is, that a defendant by a general denial puts in issue every fact which it is necessary and material for the plaintiff to allege to constitute his cause of action. Here it is conceded that non-payment of the rent was a necessary and material fact to be alleged in the complaint to constitute plaintiff's cause of action, and it should logically follow that a general denial of such allegation puts in issue the fact of non-payment. Upon an issue thus raised, the burden is on the plaintiff to prove the facts necessary and material to his cause of action.

To summarize, then, the logical rule of pleading should require, where a general denial is interposed, proof by the plaintiff of every allegation essential to his cause of

action. Therefore, where it is necessary to allege demand and non-payment, proof must be given of such allegations. In actions, however, where allegations, such as demand and non-payment, are not essential to the plaintiff's cause of action, then payment is an affirmative defense and, to be proved, must be specially pleaded, a general denial not being sufficient to admit of such proof. The distinction between the two lies in the fact that in the former plaintiff has to allege and prove non-payment as part of his cause of action; while, in the latter, the defendant confesses the cause of action, but seeks to avoid it by pleading and proving payment, which is new matter. In the case at bar, the plaintiff concluded that no proof of non-payment was needed, and none was offered; and in this condition of the record the Court directed the verdict against the defendant. As we have endeavored to point out, this seems illogical and contrary to the rule that the judgment must be *secundum allegata et probata;* and for this error, as to this cause of action, there must be a new trial.

The second cause of action is for the value of the use and occupation of the premises. It is insisted by the appellant that there is no evidence in the case that the reasonable value of the use and occupation was the amount claimed, or that such amount "now remains wholly due and unpaid." We do not deem it necessary to decide whether this contention is sound, for, in view of the conclusion which we have reached upon the first point, there must be a new trial as to both causes of action. Goodsell *v.* W. U. Tel. Co., 109 *N. Y.* 147. That case decides that where in an action at law to recover money only the complaint sets up two causes of action, and a judgment for a gross sum has been rendered in favor of the plaintiff, the Genera Term has not authority to affirm the judgment as to one cause of action and reverse it and grant a new trial as to the other. See, also,

Pollett *v.* Long, 56 *N. Y.* 201; Story *v.* N. Y. & H. R. R. Co., 6 *id.* 85.

The judgment is therefore reversed and a new trial ordered, with costs to appellant to abide the event.

All concur.

---

## COURTNEY *et al.* *v.* EIGHTH WARD BANK OF BROOKLYN.

CITY COURT OF BROOKLYN, GENERAL TERM, NOVEMBER, 1895.

§§ 649, 650.

***Warrant of attachment—what is a certified copy.***

A copy of a warrant of attachment, with the title of the action and the words "a copy," "warrant of attachment," indorsed thereon, and containing a notice of the property attached signed by the sheriff which copy is served by the sheriff upon the holder of the property. *Held*, to be a certified copy of the warrant of attachment, within the requirement of section 649 of the Code of Civil Procedure.

(*Decided November*, 1895.)

Appeal by plaintiffs from judgment of trial term in favor of defendant.

*Parsons, Shepard & Ogden*, for appellants.

*Tunis G. Bergen*, for respondents.

VAN WYCK, J.—Sheriff Courtney claims to have levied an attachment granted by Justice Vaun, of the Supreme Court, in the action of Edward F. Rice against the Cowles Engineering Company, upon the credit of the latter for

$1,485.46 in the defendant bank. Judgment was rendered in favor of the defendant, and from that this appeal is taken.

The Code of Civil Procedure (section 649, subd. 3) provides that property incapable of manual delivery may be attached "by leaving a certified copy of the warrant, and a notice, showing the property attached, with the person holding the same," and section 650 provides that such person must furnish the sheriff a certificate specifying the property so held. On August 26, 1893, the sheriff left with the defendant a copy of such warrant of attachment, with the title of the action and the words, "a copy," "warrant of attachment," endorsed thereon, and also with the following indorsement thereon, duly signed, viz.:

"To Eighth Ward Bank: You are hereby notified that the deposit of the Cowles Engineering Co. in your bank and the indebtedness owing it by your bank is hereby attached by virtue of the annexed warrant. Dated Aug. 26, '93. John Courtney, Sheriff; J. Cunningham, Deputy" (Plaintiff's Exhibit I, p. 39).

The defendant failing to furnish a certificate of indebtedness, in accordance with certificate 650, the sheriff, by letter of September 9, reminds the defendant that, on August 26, 1893, he served on it this copy of attachment, and requests it to furnish such certificate (Defendant's Exhibit B, p. 49), which the defendant does on September 12th (Plaintiff's Exhibit Q, p. 41).

The referee herein decided that this levy on August 26, 1893, was fatally defective, in that the copy of the warrant of attachment left with the defendant was not a certified copy. If he was in error in this respect, then the judgment herein must be reversed. The original warrant of attachment is always delivered to the sheriff. Therefore, it is a certification by him that is called for. Crocker, Sher. (3d ed.), p. 642, forms Nos. 140 and 141; Hayden v. Bank, 130 *N. Y.* 146; 29 *N. E.* 143. Furthermore, the

courts have favored a liberal rather than a strict construction of, and a substantial rather than a technically, exact compliance with the provisions of section 649 of the Code of Civil Procedure. Hayden *v.* Bank, 130 *N. Y.* 146; 29 *N. E.* 143; Warner *v.* Bank, 115 *N. Y.* 251; 22 *N. E.* 172; O'Brien *v.* Insurance Co., 56 *N. Y.* 52; Adams *v.* Speelman, 39 *Hun*, 35. To certify "is to testify in writing." Am. Law Dict. The plain object of this provision is to furnish the holder of such property a written declaration of the official custodian of the warrant of attachment, under his hand that the paper left with him is a copy. The sheriff did leave with defendant a copy of such warrant, with the indorsement thereon, "a copy," "warrant of attachment," and did inform defendant in writing, under his hand, that he attached the Cowles Engineering Company's deposit by virtue of the annexed warrant of attachment, the paper so served. We think the sheriff has substantially complied with this provision.

Judgment must be reversed, and new trial ordered, with costs to abide the event.

CLEMENT, C. J., and OSBORNE, J., concur.

---

## MATTER OF ANTOINE RUPPANER.

SURROGATE'S COURT, NEW YORK COUNTY, DECEMBER, 1895.

§§ 2647, 2648, 2649, 2653 A, 2694.

*Proceeding for revocation of probate—when barred by judgment previously rendered—necessary parties—personal property governed by law of the domicile.*

A party to an action brought under section 2653A of the Code of Civil Procedure to determine the validity of the probate of a will,

who has been duly served with the summons and appeared and answered by attorney is concluded by the judgment rendered therein, and may not subsequently maintain an action for the revocation of the will.

The mere fact that necessary parties are not before the Court on a trial does not oust the Court of jurisdiction so far as the persons are concerned who are made parties to the action, and the only effect of such omission is that the judgment is not binding upon a party who has been omitted.

The succession to an intestate's personal property is governed by the law of the actual domicile of the intestate at the time of his death, and it devolves upon those entitled to take it as next of kin, according to the law of such actual domicile.

(*Decided December*, 1895.)

Proceeding for revocation of probate of a will.

*Isaac N. Miller*, for petitioner.

*Lucius H. Canton*, for proponent.

ARNOLD, J.—This is a proceeding for revocation of probate of the will of the decedent, under section 2647 of the Code. The sole petitioner is Barbara Ellensohn, the half-sister of the testator, and a person interested in his estate. All parties entitled thereto under section 2649 have been duly cited herein, and all oppose the revocation except one Anna Kristof, an infant, who appears by guardian and files an answer admitting the allegations of the petition in respect to the invalidity of the will. Upon the opening of the case the respondents, with the exception above stated, moved for a dismissal of the proceedings upon grounds set forth in their respective answers. These are, first, that the proceeding was not commenced within the period limited by section 2648 of the Code; second, that the petitioner is estopped from maintaining such proceeding by reason of a judgment entered in an action to which she was a party, brought in the Supreme Court of this State by the executors of the will, under section 2653A

of the Code, to determine the validity of the probate which is herein attacked, and which judgment established such validity. It appears from the judgment roll in such action, which is put in evidence here, that Barbara Ellensohn was made a party defendant in the action, was duly served with the summons therein and appeared and answered by attorney, and is concluded by the judgment, which adjudges that the will is valid. This action was brought within one year after the will had been admitted to probate. The Legislature, in enacting section 2653A, did not repeal the other sections of the Code providing for proceedings for revocation of probate, and the intention appears to have been to embrace the provisions of section 2653A, within the existing system, not to substitute it therefor. Long *v.* Rodgers, 79 *Hun*, 443. It is expressly stated in that section that the verdict in an action brought thereunder shall be conclusive as to real or personal property, with exceptions which it is not claimed apply to this case. As the petitioner herein was a party to and is bound by the judgment in the Supreme Court action, she is concluded from further questioning the validity of the will and its probate, and further prosecution of the proceeding on her part in this Court for revocation of the probate would be futile. Matter of Peaslee, 73 *Hun*, 113; Matter of Soule, 19 *N. Y. State Rep.* 532. The petitioner, however, insists that the judgment is void because the plaintiffs in the action were permitted by an order of the Supreme Court to discontinue as against the infant defendant Anna Kristof, the contention being that as the statute provides that certain specified classes of persons must be made parties to actions brought under it, a trial could not be had until all such parties were regularly before the Court so as to be bound by any judgment entered therein. Opposition was made on behalf of the infant to the application for a discontinuance of the action against her, but the motion was granted, the Court holding that the infant had no possible

interest except under the testator's will, that she was not one of the next of kin, and that her grandmother (the petitioner herein), who is a next of kin, was bound by the judgment. From the order entered on this motion no appeal was taken, but thereafter an application was made by the petitioner Barbara Ellensohn at Special Term, to vacate the said judgment establishing the will, upon the ground that the whole judgment should be vacated as to all the defendants because it had been as to the said infant, that the latter had not been properly served, and that all proceedings at and after the trial were void, although participated in by the adult defendants, the claim being that the statute peremptorily requires that a trial shall not be had until all necessary parties are regularly before the Court. This application, however, was denied, it being held that it had already been adjudged by the order discontinuing the action against the infant that the latter was not a necessary party, that question having been necessarily involved in the disposition of that matter. From the order entered denying the motion to vacate the judgment the petitioner appealed to the General Term, which affirmed the order, holding that the mere fact that necessary parties are not before the Court on a trial does not oust the Court of jurisdiction so far as the persons are concerned who are made parties to the action, and the only effect of such omission is that the judgment is not binding upon a party who has been omitted. Keyes *v.* Ellensohn, 82 *Hun*, 13. On appeal to the Court of Appeals the order was again affirmed, without opinion. 144 *N. Y.* 700. It seems to be thus definitely established that even if the infant, Anna Kristof, was a necessary party to the action brought to establish the will, the omission to make her such party is not available to Mrs. Ellensohn for the purpose of attacking the judgment. The guardian of the infant nevertheless contends that, even if the petitioner is estopped from maintaining the present

proceeding by reason of this judgment, still his ward may continue the same by reason of her having by her answer admitted the allegations of the petition in respect to the invalidity of the will, and asked that the prayer of the petition be granted. This proposition is untenable. There is no provision of law which authorizes the substitution of an assenting respondent in these proceedings, in the place of the petitioner. See Matter of Soule, 19 *N. Y. State Rep.* 556. The infant was made a party to the proceedings solely by reason of the contingent interest devised to her by the will, and it is quite apparent that she could not have instituted the proceeding for revocation herself; the only parties who are entitled to maintain such a proceeding being those interested in the estate: that is, the husband and wife, heirs-at-law or next of kin, who would share in the estate in case of intestacy, the proceeding being one to remove the obstacle presented to such distribution by the existence of the will. In order to overcome this difficulty, the guardian has put in evidence the laws of Austro-Hungary, where the minor, as well as her parents and her grandmother, Mrs. Ellensohn, reside, from which it appears that there is a limitation on the right of parents in that country to disinherit their children, except under certain prescribed conditions, and he claims that therefore his ward has an interest in the estate which must at some future period come to her through her said grandmother. But the succession to an intestate's personal property (and this testator's estate exclusively consisted of personal property) is governed by the law of the actual domicile of the intestate at the time of his death, and it devolves upon those entitled to take it as next of kin, according to the law of such actual domicile, and as the decedent was at the time of his death an actual resident of and domiciled within the State of New York, the laws of that State in respect to such succession must prevail, and under those laws the

said infant would not, in case the testator died intestate, be entitled to any interest whatever in his estate. Section 2694, Code. The first ground upon which the motion to dismiss is made is also, I think, well taken. It is claimed on the part of the petitioner that she filed her petition within one year after the recording of the decree admitting the will to probate, and this she insists is the date when the record of the probate proceeding was remitted from the Court of Common Pleas (where that proceeding was had) to and filed in this Court. The decree admitting the will to probate was actually entered and filed in the office of the clerk of the Court of Common Pleas more than a year before the filing of the petition, and I am of opinion that any proceeding for the revocation of such probate should have been initiated within one year thereafter, and it is conceded that this has not been done here.

The motion to dismiss the proceeding is granted.

---

## O'SULLIVAN *v.* N. Y. ELEVATED R. R. CO. *et al.*

NEW YORK SUPERIOR COURT, SPECIAL TERM, NOVEMBER, 1895.

§§ 544, 757.

*Survival of cause of action—substitution of representatives of deceased plaintiff—supplemental bill.*

In an application under section 757 of the Code of Civil Procedure to substitute the representatives or successors in interest of a deceased sole plaintiff as plaintiffs in the action where the cause of action survives and continues, and where their successorship in title to the property by operation of law is undisputed; the Court must grant the order without compelling the issuance of supplemental pleadings.

Where a party has had his day in Court, and been given an oppor-

**tunity of litigating an issue or contesting facts alleged, and fails to do so, he cannot afterwards complain of the adjudication made against him or be again permitted to open or question the matter so adjudicated.**

(*Decided November*, 1895.)

Application for order substituting representatives of deceased plaintiff as plaintiffs in an action.

*Evarts, Choate & Beaman*, for the application.

*Davies & Rappallo*, opposed.

McAdam, J.—The sole plaintiff has died, and the cause of action, which is in equity, survives and continues. Plaintiff's administrator and the committee of the property of his widow and his heirs-at-law are his representatives and successors in interest in respect to the premises involved in the litigation, known as Nos. 92, 148–152 Pearl street. The Code (§ 757) provides that upon the death of the plaintiff, "The Court must, upon a motion, allow or compel the action to be continued by or against his representative or successor in interest." The proposed plaintiffs make the application themselves, by petition duly verified by one of them familiar with the facts, and none of the allegations of the petition is denied or controverted. No answer to the petition has been made, except by the demand that if the action be revived it must be upon a supplemental bill, to which the defendants may take issue upon the alleged devolution of interest. The question raised came up in Garvey *v.* Owens, 115 *N. Y.* p. 671, which was an action by the owner of real property to compel specific performance of an agreement to purchase. The sole plaintiff died before trial, and his sole heir-at-law was substituted, and the suit directed to be continued in his favor. Upon the trial defendant's counsel objected to proceeding, on the ground that by section

544 of the Code it was necessary for the plaintiff to have obtained leave to serve and to have served a supplemental complaint alleging the facts in regard to the death of the former plaintiff. The objection was overruled, and exception taken. Defendants then objected to the admission of evidence as to the death of the sole plaintiff and the devolution of title to the substituted plaintiff; this objection was also overruled, and exception taken. The General Term held that under section 757 "there was no necessity for serving a supplemental or amended complaint," and a judgment in favor of the plaintiff for the relief demanded was sustained. 9 *St. R.* 227. On affirming the judgment the Court of Appeals wrote no opinion. The question as to the necessity of a supplemental complaint was a vital one, and the Court of Appeals must have approved of the ruling of the Court below on that point, for the former Court has several times held that where it has affirmed a judgment without opinion it must be assumed that it has approved of the opinion of the Court below upon every question necessary to a decision of the case. Higgins *v.* Crichton, 98 *N. Y.* 626; *In re* Woolsey, 95 *id.* at p. 141; Hobson *v.* Dale, *id.* at p. 610. The defendants urge that if the application is granted without requiring supplemental pleadings, the order substituting the petitioners would be conclusive as to the question of their title. Citing Isham *v.* Davidson, 3 *T. & C.* 745; Powers' Case, 37 *St. R.* 893; Smith *v.* Zalinski, 26 *Hun*, 225, aff'd 94 *N. Y.* 519. In the case last cited there was not, as here, the death of the sole plaintiff, but a transfer of his interest after the action was begun. It does not hold that in the event of the substitution of a plaintiff the Court must order supplemental pleadings, but that a transfer or devolution of plaintiff's interest after issue joined "is usually a formal matter in which the defendant has no concern except to be protected from a double claim. In all other respects, the vital issues of

the litigation remain unchanged, and they only are to be tried;" and that "on the hearing" (of the motion to substitute) "the applicant must establish his ownership and the defendant may deny it. If there be doubt about it, the Court may deny the motion and order the action to proceed, irrespective of any such transfer. If there be no doubt about it, or the defendant by default or silence admits it, the Court may order the substitution; and even then, if justice or safety requires, it may order an amendment of the pleadings 'or otherwise.' By this process the defendant has ample chance to understand and contest the new ownership. If on the motion he raises the issue the Court may decide it, or order such supplemental pleadings beyond the mere substitution, as to carry the contested issue over to trial." The application is not under section 544 of the Code, for leave to serve a supplemental bill, but under section 757, which gives the petitioners the undeniable right to revive the action where, as in this instance, their successorship in title to the property by operation of law is undisputed. Under section 121 of the former Code a supplemental complaint was necessary only in cases where the motion to revive was made after the expiration of one year from the plaintiff's death. Green *v.* Bates, 7 *How. Pr.* 296. This provision was carried into the new Code in 1877 (§ 757), but was expunged two years afterwards (L. 1879, p. 607); so that the course of legislation puts at rest any question as to the established practice. The only questions presented for determination are, whether the plaintiff has died, and has interest in the cause of action passed to the petitioners. If the defendants at the hearing had tendered an issue upon the subject by disputing the facts alleged, it might have been tried and decided then and there, and it is upon this theory that the order is held to be conclusive at the trial (Underhill *v.* Crawford, 29 *Barb.* 664; Washoe Tool Co. *v.* Ins. Co., 7 *Hun*, 77, aff'd 66 *N. Y.* 613); the prin-

ciple being that if a party has had his day in Court, and been given an opportunity of litigating an issue or contesting facts alleged, and fails to do so, he cannot afterwards complain of the adjudication made against him or be again permitted to open or question the matter so adjudicated. The defendants having raised no issue, but impliedly conceded the facts alleged, they failed to show any necessity for a supplemental bill. It is therefore difficult to conceive why an order to which the petitioners have proved themselves entitled as of right should be withheld, simply because the law might impress upon it at a subsequent stage of the litigation a result which follows nearly every judicial determination almost as of course. To order a supplemental complaint as to facts undisputed, and perhaps indisputable, would be to sacrifice substance for form and encourage delay—an undesirable object to all well-intending litigants. Presumptively, the defendants cannot be "injuriously affected or exposed to the danger of another recovery" (Washoe Tool Co. *v.* Ins. Co., 7 *Hun*, 77, aff'd 66 *N. Y.* 613); and if a state of facts exists which would overcome the *prima facie* case required to be made, the same should be presented to the Court in opposition to the motion to continue, or subsequently. Obviously no harm can come to the defendants from granting the petitioners' application.

The motion must be granted, and without prejudice to the proceedings already had.

## MARY A. MORRIS, RESPONDENT, v. NEW YORK, ONTARIO AND WESTERN RAILWAY CO., APPELLANT.

COURT OF APPEALS.

§ 834.

*Physician and patient—waiver of right of secrecy as to information gained in professional capacity.*

In an action for personal injuries, the plaintiff by calling one of two physicians who had attended her, and not the other, as her own witness, and requiring him to disclose the facts and results of the examination and consultation, and make public what took place between the plaintiff and her two physicians, has waived the privilege of secrecy given under section 834 of the Code of Civil Procedure and can no longer impose silence on the other physician.

The considerations and reasons upon which the statute was founded no longer exist when full disclosure is made by either with the consent of the patient, and every party to the transaction thus disclosed is relieved from any injunction of secrecy.

In order to impeach the testimony of a witness by showing some act or omission at the consultation or afterwards by him contradictory of, or inconsistent with, his testimony at the trial, the specific question should first be put to him, and if denied or at least not admitted, should then be propounded to the impeaching witness.

(*Decided December*, 1895.)

Appeal from a judgment of the General Term, Second Department, affirming a judgment entered upon the verdict of a jury in favor of the plaintiff in an action to recover for personal injuries received in a railway accident.

*William Vanamee*, for appellant.

*William F. O'Neill*, for respondent.

O'BRIEN, J.—The responsibility of the defendant for

the personal injuries for which the plaintiff recovered in this case depended upon questions of fact. The questions with respect to the defendant's negligence and the plaintiff's negligence contributing to the injury, as well as the nature and character of the contract under which the plaintiff was in the defendant's cars as a passenger, were all properly submitted by the learned trial Judge to the jury.

The only questions involved in this appeal arise upon exceptions taken by the defendant's counsel to the exclusion of certain evidence, offered by him, bearing upon the extent and nature of the plaintiff's injuries, and, hence, upon the question of damages. It appears from the record that about the time of the commencement of this action, two physicians attended the plaintiff for the purpose of making an examination of her case, and ascertaining the extent and nature of the injuries which she received in the accident when in the defendant's cars. The plaintiff herself called one of them as a witness in her behalf, at the trial, who gave important testimony with respect to the extent and character of the injury. His testimony tended to show that the plaintiff was affected with some spinal trouble as the result of the accident. This opinion was based mainly upon the result of the personal examination of the plaintiff's person which he had made upon the occasion referred to with his associate physician. It appeared that both attended together, and after removing the plaintiff's clothing, made an examination of her person with special reference to the existence of some disease of the spine as the result of the accident. But the plaintiff did not call the other physician, and before the close of the proofs the defendant called him and propounded to him certain questions, intended to elicit his opinion as to the nature and extent of the plaintiff's injuries from his observation and examination of her person on the occasion referred to. These questions were

all objected to as inadmissible under section 834 of the Code. The Court sustained the objection and the defendant excepted. These exceptions fairly raise the question as to the defendant's right to the testimony of the witness. The learned counsel for the defendant contends that it should have been admitted, for the reason that the physician did not attend in any professional capacity, but for the purpose of qualifying himself as a witness, and that the examination was not for the purpose of enabling him to prescribe for the plaintiff. It is quite true that before this testimony could properly be excluded it must appear that the relation of patient and physician existed between the plaintiff and the witness, and we think that it appears quite clearly in the record that the witness went to the plaintiff's house, on the occasion when he made the examination, as a consulting physician, and that all the information that he acquired with reference to her condition was in that capacity. Moreover, it appears that the witness had been, until a short time before, the plaintiff's regular physician, and that she consulted him with reference to the injury in question. There can be no doubt upon the facts that both physicians attended the plaintiff upon the occasion of the examination as her physicians, in order to prescribe, or at least to diagnose the case, and to give such opinion and advice as the nature of the injury required.

It is also urged that the questions put to the witness and excluded were admissible for the purpose of impeaching the other physician who had been sworn by the plaintiff. Without reference to the answer which the plaintiff's counsel makes to this point, namely, that this method of introducing the testimony would be a plain evasion of the statute, it is quite sufficient to say that the questions were not framed in such a way as to permit an answer for the purpose of impeachment. In order to present such a point the record must show that some specific question

was put to Dr. Payne, the physician sworn by the plaintiff, as to some act or admission at the consultation or afterwards by him, contradictory of or inconsistent with his testimony at the trial which was answered in the negative, or at least not admitted, and that the same question was propounded to Dr. De Kay, the physician called by the defendant and the impeaching witness. An examination of the record shows that this rule was not complied with, and the testimony was not, therefore, admissible upon any ground now urged by the defendant. The only ground upon which the exceptions can be sustained is that the plaintiff by requiring one of the physicians as her own witness to disclose the facts and results of the examination and consultation and make public what took place between the plaintiff and her two physicians, has waived the privilege and can no longer impose silence on the other. It is a case where two physicians attended the patient, both holding professional relations to her, and in a suit in which the nature and extent of her injuries (as then appearing) is the important inquiry, she calls one of them and the defendant the other. She has the right, unquestionably, to avail herself of the testimony of the one which she thinks will be the most favorable for her case, but the question is whether she can at the same time deprive the defendant of the benefit of the testimony of the other. If she elects to waive her privilege as to one and requires him to make the consultation public and to disclose the information, does she not, necessarily, waive it as to to the other? If this is not so the statute would seem to be a serious obstacle in such cases to the attainment of truth and justice. The proposition that a patient who has retained or employed two or more professional men, under such circumstances that none of them are permitted to disclose the information thus obtained except with his consent, can call one of them as a witness to disclose what took place when all were present, and at

the same time enjoin silence on all the rest, appears to be so unfair and unreasonable that it challenges investigation before accepting it as a rule of law. The statute provides that the physician may be called as a witness when the patient expressly waives the privilege. It is held that such waiver may be made on the part of the patient by calling him as a witness. *In re* Coleman, 111 *N. Y.* 220; Rosseau *v.* Bleau, 131 *N. Y.* 177; 118 *N. Y.* 77.

In this case it was the privilege of the plaintiff to insist that both physicians should remain silent as to all information they obtained at the consultation, but she waived this privilege when she called Dr. Payne as a witness and required him to disclose it. The plaintiff could not sever her privilege and waive it in part and retain it in part. If she waived it at all, it then ceased to exist, not partially, but entirely. The testimony of Dr. Payne having been given in her behalf, every reason for excluding that of his associate ceased. The whole question turns upon the legal consequences of the plaintiff's act in calling one of the physicians as a witness. She then completely uncovered and made public what before was private and confidential. It amounted to a consent on her part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained.

I have not been able to find any controlling authority in this Court in support of the idea that the waiver applied only to the witness that the plaintiff called. On the contrary, the principle decided in McKinney *v.* Grand St. R. R. Co., 104 *N. Y.* 352, supports the views herein expressed. That was a case where the plaintiff called and examined her own physician as to her physical condition on the first trial. On a subsequent trial he was called by the defendant, and the same objection was made to his testimony that was made in the case at bar. This Court

held that it was admissible on the ground that the statutory prohibition having once been expressly waived by the patient, and the waiver acted upon, it could not be recalled, but the information was open to the consideration of the entire public, and the patient was no longer privileged to forbid its repetition. The reasoning of Chief Judge Ruger in support of these propositions in that case is applicable here. It furnishes a safe basis for holding that when a waiver is once made it is general and not special, and its effect cannot properly be limited to a particular purpose or a particular person.

After the information has once been made public no further injury can be inflicted upon such rights and interests of the patient as the statute was intended to protect, by its repetition at another time or by another person.

In Marx *v.* Man. R. R. Co., 56 *Hun*, 575, it was held that the plaintiff by testifying to what had taken place between himself and his physician had waived his right to object to the examination of the latter when called as a witness for the defendant.

In Treaner *v.* Man. R. R. Co., 28 *Abb. N. C.* 47, it was held that the plaintiff by simply disclosing, as a witness, his physical condition in consequence of the defendant's acts, waived the right to object to his physician's testimony when called by the defendant. I have not been able to find that either of these cases came to this Court. The one last cited certainly pushes the principle too far. The other may also be open to some doubt, and both are cited, not as controlling authority, but in order to show the views that very able jurists have entertained with respect to the construction of the statute.

In Hope *v.* T. & L. R. R. Co., 40 *Hun*, 438, it was held that the plaintiff by waiving her right to object in respect to one physician, whom she had called as a witness in her own behalf, did not thereby waive her objection to the examination of other physicians who had attended her at

other times when called by the defendant. This case was affirmed in this Court, without an opinion (110 *N. Y.* 643), by a bare majority. It, however, presented a very different question from the one involved in the case at bar. The question here arises with respect to a single consultation or interview between the plaintiff and the two physicians, and not to separate and distinct transactions with as many different physicians. In the latter case there is good reason for holding that the waiver of the privilege applies only to such consultations or transactions as the witness who is required by the patient to make the disclosure has participated in. That rule is broad enough for this case.

The case of Record *v.* Village of Saratoga Springs (46 *Hun*, 448) was undoubtedly quite similar, if not identical in its facts, with the case at bar. The testimony of the associate physician was excluded, and the General Term affirmed the decision. The case was decided by two Judges, and it is evident from the opinion of one, at least, that the decision turned upon the broad prohibitory words of the statute, and not upon the provision which permits the patient to waive the objection. These words are certainly broad enough to prohibit the testimony of every physician who has obtained information in a professional capacity, but the statute does not attempt to define what shall in any case constitute a waiver. That is left to be determined by the Courts with reference to the facts of every case, upon general principles of reason and justice.

While the case last cited subsequently came to the Second Division of this Court, it was affirmed without an opinion (120 *N. Y.* 646). In this condition of the authorities we must regard the question as still open. We think that a construction of the statute which permits a patient who has been attended by two physicians at the same examination or consultation to call one of them as a witness to prove what took place or what he learned, thus

making public the whole interview, and still retain the right to object to the other, is unreasonable and unjust, and should not be followed. The waiver is complete as to that consultation when one of them is used as a witness. The considerations and reasons upon which the statute was founded no longer exist when full disclosure is made by either with the consent of the patient, and every party to the transaction thus disclosed is relieved from any injunction of secrecy. The patient cannot limit the scope or effect of the waiver when made any more than she can recall it. When the plaintiff in this case called one of the physicians who disclosed the whole consultation, the law determined the legal effect of that act, irrespective of any mental reservations on her part. Upon every principle of reason and justice this act amounted to a waiver of the right to object to the testimony of the other physician when called by the defendant, as to the same transaction.

For these reasons we think the testimony excluded was admissible, and that the judgment must be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

# MARION E. STONE, APPELLANT, v. ALVAH D. PRATT, RESPONDENT.

SUPREME COURT, GENERAL TERM, FIFTH DEPARTMENT, OCTOBER, 1895.

§§ 641, 723.

*Attachment—not an original process—power of the Court to amend the warrant—the word "must" not mandatory in statutes.*

The attachment under our Code is not an original process by which an action is commenced; it is a mere proceeding in an action. Its office is to obtain possession of and hold the debtor's property until the recovery of the judgment, and thereby prevent him from fraudulently disposing of it.

There is nothing in section 641 of the Code of Civil Procedure expressly providing or which indicates that the Legislature intended that a failure to fully state the grounds for the attachment should necessarily make it void, and the Court therefore had the inherent power to make the amendment. The attachment being a process in the action, power to amend it was given the Court by section 723 of the Code.

The word "must" in statutes is not to be construed as mandatory nor as operating to prevent an amendment in a proper case of an attachment, when the grounds of its issuance have been erroneously stated.

*Held*, that the Court has power, under section 723 of the Code, to amend a warrant of attachment by substituting the word "and" for the word "or," in order to state correctly the grounds of the attachment.

Cronin *v.* Crooks (143 *N. Y.* 352), distinguished.

(*Decided October*, 1895.)

Appeal by the plaintiff from an order of the Special Term, Monroe County, denying plaintiff's motion to amend a warrant of attachment heretofore granted, and also from an order vacating such attachment.

*Thomas Raines*, for appellant.

*Clarence E. Shuster*, for respondent.

LEWIS, J.—A warrant of attachment was granted in this action on the 18th day of July, 1895. The grounds for the attachment were recited therein to be, "that said defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete his property with intent to defraud his creditors."

The attachment was executed, and the defendant moved to vacate and set it aside upon the ground, first, of the insufficiency of the affidavits upon which the warrant was granted, and for the further reason that there was a failure to recite therein any ground for the attachment. The defendant's motion was based upon the original papers on which the attachment was granted.

Plaintiff thereupon obtained an order for the defendant to show cause why the attachment should not be amended by substituting the word "and" for "or" in the clause in the attachment in which the grounds were recited, so that it would read, that said defendant "has assigned, disposed of, or secreted, and is about to assign," etc.

The motions, by consent of the parties, were heard together.

The Special Term justice held that the papers upon which the attachment was issued were sufficient to warrant its issue, but that the grounds upon which it was granted were not properly stated in the warrant, and denied the plaintiff's motion to amend, for the reason that he concluded that he did not possess the power to grant the motion.

Defendant's motion to vacate the attachment was granted.

It was quite satisfactorily shown by the affidavits upon which the attachment was issued that the defendant had

been fraudulently disposing of a portion of his property with the intent to defraud his creditors, and that he was about to assign, dispose of, or secrete the balance of it with a like intent. The papers made a very meritorious case for the attachment, but in preparing the warrant, by inadvertence plaintiff's attorney used the word "or" instead of "and."

It is provided by section 641 of the Code of Civil Procedure that a warrant of attachment must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground for the attachment.

The only question we are required to consider is whether the provision requiring the statement of the ground of the attachment is so far mandatory that the Court was powerless to correct the inadvertent error. It was not a case of a failure to state the ground for the reason that none in fact existed, for, as stated, the two reasons which the draughtsman intended to state, in fact, existed.

The attachment under our Code is not an original process by which an action is commenced; it is a mere proceeding in an action. This action was commenced by the service of the summons and complaint. The office of the attachment was to obtain possession of and hold the debtor's property until the recovery of the judgment, and thereby prevent him from fraudulently disposing of it. The office of the attachment was not to give the Court jurisdiction of the action.

The word "must" in statutes has been frequently construed not to be mandatory. It was so held in Brinkley *v.* Brinkley (56 *N. Y.* 192); Jenkins *v.* Putnam (106 *id.* 275); Spears *v.* Mayor, etc. (72 *id.* 442); The People *ex rel.* Cavanagh *v.* McAdam (28 *Hun*, 284); The People *ex rel.* Lefever *v.* Supervisors of Ulster County (34 *N. Y.* 268); Dutchess County Mut. Insurance Co. *v.* Van Wagonen (132 *id.* 404).

There is nothing in section 641 expressly providing or

which indicates that the Legislature intended that a failure to fully state the grounds for the attachment should necessarily make it void. There being nothing in the statute prohibiting it, the Court, we think, had the inherent power to permit the amendment. The attachment being a process in the action, power to amend it was given the Court by section 723 of the Code of Civil Procedure, which provides that the Court may at any stage of the action, in furtherance of justice, amend any process or other proceeding by correcting a mistake, etc.

Orders permitting amendments in similar cases have been sustained in the cases of Kissam *v.* Marshall (10 *Abb. Pr.* 424); People *ex rel.* N. Y. C. & H. R. R. R. Co. *v.* Cook (62 *Hun*, 303); Gribbon *v.* Freel (93 *N. Y.* 96); Peiffer *v.* Wheeler (76 *Hun*, 280); The Thames & Mersey Insurance Co. *v.* Dimmick (51 *N. Y. St. Rep.* 41); Kibbe *v.* Wetmore (31 *Hun*, 424).

In the latter case the attachment was issued upon the ground that the defendant was a non-resident of the State, which was the only ground stated in the attachment. The Court, on motion, allowed the writ to be amended by inserting therein that the defendant had disposed of his property with intent to defraud his creditors, and had kept himself concealed with like intent, and with intent to avoid service of process.

The case of Cronin *v.* Crooks (143 *N. Y.* 352), upon which the respondent mainly relies to sustain the order, can, we think, be distinguished from this case. There the affidavit upon which the attachment was issued stated but a single ground, to-wit, that the defendant had assigned and disposed of her property with intent, etc. It was recited in the warrant of attachment that defendant "has assigned and disposed of, or is about to assign or dispose of, her property," with intent, etc.

It was held that there was a failure to state any ground in the attachment for the reason that to state in

the alternative is to state neither the one nor the other fact.

The question whether the Court below possessed the power to grant an amendment of the attachment was not presented to the Court for decision, for in Cronin v. Crooks, so far as it appears, no such motion had been made. The amendment asked for here was manifestly in the interests of justice, and would have been granted had the Court concluded that it possessed the power so to do.

As we are of the opinion that the Court had the power to grant the relief, and that it was a very proper case for its exercise, the order vacating the attachment, and the order denying the plaintiff's motion to amend, should be reversed, and the plaintiff's motion to amend the attachment be granted.

BRADLEY, WARD, and ADAMS, JJ., concur.

Order reversed and motion to amend granted.

---

## JAMES W. STANTON, APPELLANT, v. UNITED STATES PIPE LINE COMPANY, RESPONDENT.

SUPREME COURT, GENERAL TERM, FIFTH DEPARTMENT, OCTOBER, 1895.

§§ 432, 844.

*Affidavit taken without the State—service of summons on director of foreign corporation within the State.*

In an action against a corporation where the cause of action arose out of the State, the service of summons upon a director within the State does not give the Court jurisdiction of the action unless

the defendant had at the time of such service property within the State.

An affidavit made by one of defendant's directors denies that defendant had any property within the State; but omits to state the source of his information or grounds of his belief, or when he became a director of defendant corporation, or whether he became a director before or after the service of summons on the defendant: the affidavit of the plaintiff, on the other hand, states positively that the defendant did own property in the State at the time of the service, and gives the location and description of the property, together with the sources of plaintiff's information. *Held*, that the weight of evidence upon the question was fairly with the plaintiff.

Under section 844 of the Code, providing that an affidavit taken in another State may be used here if "taken before an officer authorized by the Laws of the State to take and certify the acknowledgment and proof of deeds to be recorded in the State."

*Held*, that an affidavit purporting to be taken before an acting notary public in Pennsylvania, duly authorized by the Laws of Pennsylvania to take the affidavit, but without a certificate showing that he was authorized by the Laws of that State to take and certify the acknowledgment and proof of deeds to be recorded in that State, was not properly certified so as to entitle it to be used upon a motion.

(*Decided October*, 1895.)

Appeal by plaintiff from an order of Special Term, Erie County, vacating and setting aside the service upon the defendant of the summons and complaint in this action.

*John C. Hubbell*, for plaintiff, appellant.

*A. C. Wade*, for defendant, respondent.

Lewis, J.—The defendant is a foreign corporation, organized under the laws of the State of Pennsylvania.

The plaintiff, having a cause of action against the defendant for services rendered in the State of Pennsylvania, caused a summons and complaint to be served upon one, Hugh King, who was at the time one of the defendant's directors and a resident of this State.

As the cause of action arose out of the State, the service upon King did not give the court jurisdiction of the action unless the defendant had at the time of such service property within this State. Subd. 3, § 435, *Code of Civ. Proc.*

All the evidence bearing upon the question whether the defendant in fact had property in New York was furnished by the affidavits of a Mr. Berwald and that of the plaintiff. Berwald's affidavit purported to have been made before Samuel Grumbine, a notary public in and for Crawford County, State of Pennsylvania, on the 26th day of November, 1894. The material part of his affidavit bearing upon the question is as follows:

"I am one of the directors of the defendant named in the above-entitled action. The said defendant is a corporation duly organized and existing under the Laws of the State of Pennsylvania, and is, and since its organization has been, engaged in doing business in said last-mentioned State; its principal office and place of business under said laws is in the City of Bradford, County of McKean, and State of Pennsylvania. It has not, and never has had, an office or place of business in the City of New York or State of New York. It does not now, and did not at the time of the attempted service of the summons and complaint herein, transact any business within the City or State of New York, neither had it then nor has it now any property, nor has it at any time had any property of any kind situated in said State of New York; that Hugh King, upon whom said attempted service was made, is one of the directors of said corporation, and is not otherwise connected with or concerned in its business, and the said Hugh King is not an officer of said company except being one of its directors as aforesaid, and he does not now and did not at the time of said attempted service, transact any business for or an account of said defendant, corporation anywhere within the State of New York.

He did not at that time have, and has not now, any property of said defendant in his custody within the State of New York, and he did not then, and does not now, maintain an office for it, the said defendant corporation, anywhere in the said State of New York."

There is nothing in the case showing the day when the service upon King was made. The summons and complaint bear date March 9, 1894.

It appears in the affidavit of Mr. Wade, the defendant's counsel, used upon the hearing of the motion, that the defendant's time to answer the complaint was extended by stipulation till the 23d day of November, 1894. The service must have been made prior to that date.

Berwald's affidavit is criticised by the plaintiff's counsel. He suggests that it does not appear that Berwald in fact had any knowledge as to whether the defendant had property in the State at the time of the service upon King; that it nowhere appears in the affidavit when he became one of the defendant's directors; that for anything that appears to the contrary in the affidavit, he may have become a director months after the service of the papers on King; that the source of his information as to the property of the corporation is not stated. It is claimed that the affidavit amounts simply to the opinion of the affiant.

The affidavit of the plaintiff, on the contrary, states positively that the defendant did own property in the State at the time of the service.

The location and description of the property are given, and the sources of the plaintiff's knowledge are fully stated.

It would seem that the weight of evidence upon the question was fairly with the plaintiff.

A preliminary objection was made to the reading of Berwald's affidavit upon the ground that it was not properly certified so as to entitle it to be read. It purports to have been taken before Samuel Grumbine, a notary pub-

lic in and for Crawford County, in the State of Pennsylvania. The certificate is to the effect that Grumbine, "by whom the annexed and foregoing affidavit was taken, was at the date thereof an acting notary public in and for said county * * * duly qualified, and as such duly authorized by the Laws of this Commonwealth to take the same. And further, that I am acquainted with the handwriting of the said notary public, and believe the signature purporting to be his to be genuine, and that the same is executed according to the Laws of Pennsylvania." The certificate was made by P. P. Moyer, clerk of the courts of Crawford County.

It is provided by section 844 of the Code of Civil Procedure that an affidavit taken in another State may be used here, provided it was taken "before an officer authorized by the laws of the State to take and certify the acknowledgment and proof of deeds to be recorded in the State."

This certificate stated that Grumbine was an acting notary, and as such was duly authorized by the laws of Pennsylvania to take the affidavit; but it failed to state that he was authorized by the laws of that State to take and certify the acknowledgment and proof of deeds to be recorded in that State, and the question is whether the certificate was in substance and effect in compliance with the requirements of said section so as to entitle the affidavit to be used. If it follows that because Grumbine was a notary public he could take acknowledgments of deeds in that State, then the certificate was sufficient.

The duties of notaries differ in different States. The power to take acknowledgments of deeds so as to entitle them to be recorded was first conferred upon notaries in this State by chapter 360 of the Laws of 1859. Whether the Legislature of Pennsylvania has ever conferred like powers upon its notaries does not appear from the case. All the safeguards which the Legislature has provided

for the use of a substitute for common-law evidence in the administration of justice in our courts should be enforced.

Taking and certifying the acknowledgment and proof of deeds to be recorded is an important official act. Important interests are frequently involved thereby. The words quoted from section 844 were used, we think, for a purpose. It was thought by the Legislature that it would be proper to allow an affidavit made in another State to be used here, provided it was taken before an official who had by the authority of the State appointing him been deemed worthy to have been invested with the power to take the acknowledgment of deeds to be recorded, a very different official act from the simple administration of an oath.

A more liberal construction has been given to this provision of the Code of Civil Procedure by some of the cases than the one we are inclined to adopt.

We are of the opinion that the affidavit was not properly certified so as to entitle it to be used upon the motion.

The defendant consequently failed to make a case entitling it to the order. The order should be reversed, with ten dollars costs and disbursements, and the motion to vacate the service of the summons and complaint denied.

Bradley, Ward, and Davy, JJ., concurred.

# ESTATE OF ABBY E. LAYTIN.

SURROGATE'S COURT, NEW YORK COUNTY, JANUARY, 1896.

§ 2481, subd. 2, § 2649.

*Proceeding for revocation of probate—when citations must issue.*

If the petition for revocation of probate of a will is filed within the time limited by law, the contest is then instituted, and citations may issue at any time, or from time to time thereafter, to the necessary parties, and it is the duty of the surrogate to issue the same, and before proceeding upon the petition, to adjourn the hearing until all necessary parties are cited, notified or appear.

The failure of the petitioner in the proceeding for revocation of probate to continue further after filing the petition and issue citations to the necessary parties, does not make the petition of no effect or afford ground for its dismissal.

(*Decided January*, 1896.)

Application by surviving executor of a will to dismiss a proceeding for revocation of probate thereof.

*S. M.* and *D. E. Meeker*, for executor.

*Thos. W. Fitzgerald*, for petitioners.

ARNOLD, J.—This is an application on the part of the surviving executor of the will to dismiss a proceeding for revocation of the probate thereof. The petitioners in the latter proceeding filed their petition on the last day allowed for that purpose by section 2648 of the Code, and certain persons and corporations were therein stated to be legatees named in the will, and a citation to such parties and to the surviving executor of the deceased, as required by section 2649 of the Code, was accordingly issued and served upon several of them. Three of the persons so

named in the citation had, however, died prior to the filing of the petition, and their personal representatives were not, as such, cited as provided in the last-mentioned section. One other party named in the citation was not served with the same, she having removed from the State. On the return of the citation a motion was made on the part of the executor of the will to dismiss the proceeding upon the ground that the petition was filed too late; that the citation should have been served upon all parties required by law to be cited within sixty days after the petition was filed, and that this had not been done. This motion was denied upon the authority of Matter of Gouraud (95 *N. Y.* 256), but the petitioners were admonished to proceed diligently to bring in the omitted parties. No order was entered on this decision; but four weeks after it was announced the petitioners obtained an order for a supplemental citation directed to such persons, but no such citation was then or has since been taken out, and those parties have not been brought into this proceeding. The present motion to dismiss the proceeding was made after two months had elapsed from the time this supplemental citation was ordered, and upon the ground of laches on the part of the petitioners in not bringing in these additional parties. Supplemental citations are alleged by such petitioners to have been issued to two other persons not served with the original citation or not named therein, but such citations have not been returned to this office nor have any proofs of service of same been filed. The petitioners have failed to bring all necessary parties before the Court, and if that fact could afford sufficient ground for granting this application I should be disposed to grant it; but the language of the Court of Appeals in Matter of Gouraud (*supra*) seems clearly to hold that if the petition for revocation of probate is filed within the time limited by law, the contest is then instituted, and that citations may issue at any

time, or from time to time thereafter, to the necessary parties, and it is the duty of the Surrogate to issue the same (§ 2481, *Code*, subd. 2), and, before proceeding upon the petition, to adjourn the hearing until all necessary parties are cited, notified or appear. If the petitioner does not make the necessary application the executor, if he desires the allegations of the petition to be disposed of, can have the proper citations issued. In effect the mere failure of the petitioner to proceed further after filing the petition does not make the petition of no effect or afford ground for its dismissal. I am therefore constrained to hold that I cannot dismiss the proceeding in its present stage.

Application denied.

---

## AMELIA L. SPIES, AS ADMINISTRATRIX OF THE LAST WILL AND TESTAMENT OF FRANCIS SPIES, DECEASED, *v.* HEINRICH MICHELSEN.

SUPREME COURT, TRIAL TERM, NEW YORK COUNTY, JANUARY, 1896.

§ 531.

***Bill of particulars—forms no part of the pleadings.***

It is not the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but only to point out the items and particulars embraced in his claim in order to identify them.

A copy of an account or bill of particulars, which has not been put in evidence, forms no part of the record and cannot be incorporated in the case on appeal.

(*Decided January*, 1896.)

Settlement of proposed case on appeal.

The opinion states the material facts.

*James Harold Warner*, for plaintiff and proposed case.

*Hamilton R. Squier*, for defendant, opposed.

GIEGERICH, J.—The complaint was dismissed at the trial because it did not, in my opinion, state facts sufficient to constitute a cause of action; and plaintiff has appealed. The latter seeks to incorporate into the case on appeal "a copy of the account existing between the estate of Francis Spies, deceased, and the defendant Heinrich Michelsen from the first day of January, 1893 (the day of the last previous accounting between the said Francis Spies, deceased, and the said defendant), to the 21st day of June, 1893," served in pursuance of a demand therefor by the defendant's attorney, and which the defendant by proposed amendments, seeks to eliminate from plaintiff's proposed case. It is urged by plaintiff that "the bill of particulars is regarded as being incorporated into the complaint, the two are read together as if they constituted a complaint consisting of a statement of the cause of action with particulars, and are deemed the complaint;" but the authorities do not favor the position contended for.

The Code contemplates two kinds of bills of particulars, the first relating to "the items of an account" alleged in a pleading, the second to matters constituting any other form of claim. *Code of Civil Procedure*, § 531; Dowdney *v.* Volkening, 37 *Superior Ct. Rep.;* 5 *Jones & Sp.* 313, 316. The copy account in the case at bar comes clearly within the first class of cases, and is therefore subject to the rules applicable to a bill of particulars.

It is not the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but only to point out the items and particulars embraced in

his claim in order to identify them. Seaman *v.* Low, 17 *Superior Ct. Rep.;* 4 *Bosw.* 337. A party cannot plead or answer to a bill of particulars, which forms no part of the record. Kress *v.* Seligman, 8 *Barb.* 439. "The facts that would entitle a party to judgment must be stated in the pleading, the details of the claim are to be stated in the bill of particulars" (per INGRAHAM, J., in Arrow Steamship Co. *v.* Bennett, 23 *Civ. Pro.* 234, 237; 26 *N. Y. Supp.* 948, 949); and where the sole question determined by the judgment is that the pleading demurred to does or does not state facts sufficient to constitute a cause of action, the addition to the record of any paper other than the pleadings, the demurrer and the judgment is unnecessary. Arrow Steamship Co. *v.* Bennett, *supra.* See Kreiss *v.* Seligman, *supra.* It would seem to follow from these views that the copy account in the present case forms no part of the complaint, and since it was not put in evidence it forms no part of the record; hence the defendant's proposed amendments numbered 2, 3 and 5 respectively, should be allowed.

All other proposed amendments contested by plaintiff's counsel are allowed.

Case and exceptions settled and ordered on file.

# SHERMAN *et al.* v. GREEN.

SUPREME COURT, GENERAL TERM, THIRD DEPARTMENT, DECEMBER, 1895.

§ 2990.

***Jury trial in Justice's Court—waived when not demanded on return day.***

On a trial in a justice's court, unless a jury trial is demanded at the time of the joining of issue, the right to trial by jury shall be deemed waived; but where the entry in the justice's return on appeal leaves it uncertain whether a jury trial was demanded on the day of the joinder of issue or a subsequent day of adjournment, it is error for the County Court to deny a motion requiring the justice to make an amended return showing specifically when the demand for a jury trial was made.

To ask the justice to make a return which will clear up this uncertainty is not to ask him to contradict or falsify his original return, but to cure it of all uncertainty; and it therefore does not come within the principle that a justice cannot be asked to make an amended return which will falsify or contradict the one originally made by him.

(*Decided December*, 1895.)

Appeal by plaintiffs from an order of the County Court of Washington County denying a motion for an amended return of the justice before whom the action was tried, and from an order reversing the justice's judgment.

The facts are stated in the opinion.

*Frederick W. Sherman*, for plaintiffs, appellants.

*J. B. McCormick*, for defendant, respondent.

HERRICK, J.—The plaintiffs recovered a judgment in

a justice's court against the defendant. The defendant appealed therefrom to the County Court.

The justice, in his return, under the record of proceedings at the joining of issue, has these words: "Defendant appeared in person and by counsel, and filed an answer in writing, and demanded a jury, and stated that they were ready for trial." The words "and demanded a jury" had a line drawn through them in the return, as filed, and upon the margin of the return appeared these words: "Defendant asks for a trial by jury, and asks that a venire be issued in the usual form required by the Code." On the return of the second day's proceedings, these words appeared: "The defendant insists upon a trial by jury, and asks that the venire be issued in the usual form. That a jury was demanded by the defendant at the joinder of issue of the trial. Defendant objects to proceeding to trial in this issue without a jury, and now tenders therefor $1.75 for such jury. Plaintiffs object to the allowance of the jury, on the ground that the defendant joined issue and took an adjournment without making any demand therefor." It does not appear whether the demand for a jury by the defendant, which appeared upon the margin of the return, was intended as a record of the proceedings of the day of the joinder of issue, or the proceedings upon the adjourned day. The plaintiffs insist that that refers to the demand made at the adjourned day. The defendant claims that it was the demand made at the joinder of issue. The plaintiffs made a motion to the County Court for a further and amended return, which should show when this demand for a jury was made; claiming that the demand made at the joinder of issue had been waived by the defendant, and the demand set forth in the margin referred to the demand made by him upon the adjourned day. The motion for a further return was denied and the judgment reversed upon the ground that the defendant had been

improperly deprived of a trial by jury of the issue in the action. The motion for an amended return was denied upon the ground that there was no power in the Court to compel the justice to make an amended return which would contradict the original return.

Section 2990 of the Code of Civil Procedure provides that, unless a jury trial is demanded at the time of the joining of issue, the right to trial by jury shall be deemed waived. It will be seen, therefore, that it is important to have returned to the Court the fact whether such demand for trial by jury was made by the defendant at the time of joining of issue, and, if so, whether it was waived. The entry in the margin of the justice's return leaves these questions unsettled. From the position of the entry upon the record, it leaves it uncertain as to whether it refers to the day of the joinder of issue, or to the proceedings had upon the day to which the trial was adjourned. To ask the justice to make a return which will clear up this uncertainty is not to ask him to contradict or falsify his original return, but to cure it of all uncertainty; and it therefore does not come within the principle of the cases cited to us, that a justice cannot be asked to make an amended return which will falsify or contradict the one originally made by him.

The order of the county judge denying the further amended return should therefore be reversed, and an order made requiring such further or amended return as asked for in the plaintiff's notice of motion therefor; and the judgment of the county judge reversing the judgment should be reversed, with directions to the County Court to hear the appeal upon the return of the justice as amended and corrected. Let an order be entered accordingly, with costs and disbursements of this appeal.

MAYHAM, P. J., and PUTNAM, J., concur.

## JOHN BYRNES *v.* EDWARD R. LADEW AND JOSEPH H. LADEW.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, JANUARY, 1896.

§§ 772, 873.

*Examination of party before trial—motion to vacate order for examination—where properly heard.*

A party may examine his adversary before trial in order to frame his pleading, or complete his proof, but not to ascertain whether he has a cause of action or a defense against the adversary.

(*Decided January*, 1896.)

Motion by defendants to set aside an order for their examination before trial.

*Martin & Smith*, for the motion.

*Booth & Deane*, *contra.*

PRYOR, J.—As the defendants move, upon plaintiff's own papers, to vacate the order for their examination before trial, the application, although on notice, is properly heard at Part II. of the Special Term (*Code*, § 772, last clause; Sturtz *v.* Fisher, herewith decided; *N. Y. Law Journal*, January 21st, 1896).

The complaint exhibits a cause of action against defendants for injury from a defective elevator.

Upon allegations, in an affidavit, that the plaintiff is unable to "ascertain" whether the defendants or somebody else are responsible for his injury—in other words, whether he has a cause of action against them—he proposes to examine them "to ascertain" the fact of their liability.

As said by BARTLETT, J., in Churchman *v.* Merritt (51 *Hun*, 375, 377), "It would seem that the real purpose in the examination of the defendant is not to obtain knowledge of facts which will facilitate the statement" (or proof) "of a known and ascertained cause of action, but is rather to find out whether any cause of action whatever really exists in her behalf against these defendants. Under these circumstances, an examination of the defendant before trial is not authorized by the statute. To sanction it would be to permit investigations of the most harassing character, and give rise to a practice liable to great abuse." See Britton *v.* McDonald, 3 *Misc.* 514; Winston *v.* English, 44 *How.* 398.

The cases cited *contra* are not of authority to overthrow this principle. Sweeney *v.* Sturgis (24 *Hun*, 162) was a decision by a divided Court. Douglass *v.* Meyer (21 *Supp.* 1091) was a ruling at Special Term. In *Re* Nolan (24 *Supp.* 298; 53 *St. Rep.* 737; 70 *Hun*, 536) the application was, before action brought, to take and perpetuate testimony; but even as such I question its propriety, since surely it was never the policy or purpose of the statute to permit an experiment of discovery whether a plaintiff have a cause of action against any person whom he may be pleased to implead and subject to the inquisition. A party may examine his adversary in order to frame his pleading or complete his proof, but not to ascertain whether he has a cause of action or a defense against that adversary.

Motion granted.

## *In re* JOHN PARKE.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, JANUARY, 1896.

§ 2325.

*Lunatic—appointment of committee of person and property.*

**Section 2325 of the Code of Civil Procedure, providing for the appointment of a committee of the person and property of a lunatic, does not require notice to be given to a relative of the alleged incompetent person, when the application for the appointment of committee is made by the husband or wife. The statute contemplates that the motion for the appointment of a committee may be made by "any person," and that if made by any person other than husband or wife, or a relative, notice thereof must be given to the husband or wife, or to a relative. Notice is only to be given to a relative when not given to the husband or wife.**

(*Decided January*, 1896.)

Motion by William P. Parke, the son of the alleged lunatic, for appointment of himself as committee.

*William L. Flagg*, for the motion.

*Frank Moss*, opposed.

TRUAX, J.—I am of the opinion that section 2325 of the Code does not require notice to be given to a relative of the alleged incompetent person, when the application for the appointment of committee is made by the husband or wife. The statute contemplates that the motion for the appointment of a committee may be made by "any person," and that if made by any person other than husband or wife, or a relative, notice thereof must be

given to the husband or wife or to a relative. Notice is only to be given to a relative when not given to the husband or wife. In this case it was unnecessary to give notice to the wife, because she made the application. It is to be noticed that this is not an application to set aside the commission heretofore issued herein, and that therefore I cannot set that commission aside, even if it has been improperly issued. The motion is to appoint a certain person committee of the person and property of the alleged incompetent person. This I decline to do because it has been made to appear that a commission is now in force, and on the return of that commission the matter can be brought before the Court.

Motion denied, without costs.

---

HENRY F. GILLIG, APPELLANT, *v.* GEORGE C. TREADWELL COMPANY, DEFENDANT; HUGH J. GRANT, AS TEMPORARY RECEIVER, RESPONDENT.

COURT OF APPEALS.

§§ 644, 697, 1406, 1407.

*Successive attachments—priority—levies upon different pieces of property.*

Where a sheriff receives several attachments against the same debtor, it is his duty to satisfy them in the order in which they were received. If he has levied upon separate property under each attachment, and it turns out that that levied upon under the senior attachment is insufficient to satisfy it, then the property levied upon under the junior attachment, or so much thereof as is necessary, must be applied to satisfy the senior attachment. (*Code*, §§ 644, 697, 1406, 1407.) The policy of the law is to give the creditor the preference to which his diligence entitles him.

Henry F. Gillig *v.* George C. Treadwell Company.

**While an attachment may not become a lien upon the personal property of the defendant until actual levy, as soon as levy is made, the lien attaches, and under the provisions of the Code, it inures to the benefit of the attaching creditors in the order of their priority, which is determined by the order of the delivery of the attachment to the sheriff.**

(*Decided January* 14, 1896.)

Appeal from an order of the General Term, Third Department, affirming an order of the Albany Special Term, denying the plaintiff's motion to have the property of the defendant in the Sheriff's hands sold and applied upon the plaintiff's execution.

*J. Murray Downs*, for appellant.

*Latham G. Reed*, for respondent.

HAIGHT, J.—On the eighth day of January, 1894, the plaintiff brought an action against the defendant, and on the following day procured an attachment to be issued against its property, which was on that day delivered to the Sheriff of Albany County to be executed. Three days thereafter the respondent, Hugh J. Grant, as temporary receiver of the St. Nicholas Bank of New York, procured an attachment to be issued against the defendant in an action then pending against it, in which Grant, as such receiver, was the plaintiff, which attachment was on that day delivered to the Sheriff; and on the following day another attachment was procured and delivered to the Sheriff in an action in which the National Spraker Bank of Canajoharie was plaintiff. It appears that the plaintiff's claim, upon which judgment has been entered, was for the sum of $14,121.19; that the Sheriff levied upon the personal property of the defendant the three attachments delivered to him, but that, instead of making a general levy of any one attachment upon all of the personal property of the defendant, he levied each attachment upon separate, distinct portions thereof, and caused

the same to be inventoried and appraised; that the property upon which the plaintiff's attachment was levied was appraised by the Sheriff at the sum of $11,000; that the property upon which the Grant attachment was levied was appraised at $5,365.15, and that upon which the National Spraker Bank attachment was levied at the sum of $5,500. It further appears that after the plaintiff had procured his judgment to be entered he caused an execution to be issued to the Sheriff, under which the property levied upon by virtue of his attachment was sold, bringing only the sum of $6,500, thus leaving a balance remaining unpaid upon his execution of upwards of $8,000. He thereupon called upon the Sheriff to sell the remaining property of the defendant held by him by virtue of the levy of the junior attachments and to apply the proceeds upon his execution. This the Sheriff refused to do, and thereupon the proceedings now under review were instituted.

It is contended on behalf of the plaintiff that, his attachment having been first issued and delivered to the Sheriff, he thereby acquired a lien upon all of the property of the defendant subsequently levied upon by the Sheriff, either by virtue of his own warrant of attachment, or that of the junior attachments; that his attachment being the first, he obtained a priority over the others. On behalf of the respondent Grant, it is contended that each attachment having been levied upon separate specified property of the defendant, each acquired a lien upon the property levied upon by virtue of his attachment; that the property so separately levied upon must be held by the Sheriff and applied only upon the executions issued in the action in which the property had been attached.

The provisions of the Code of Civil Procedure bearing upon the question thus presented are as follows:

"The Sheriff to whom a warrant of attachment is de-

livered may levy, from time to time, and as often as is necessary, until the amount for which it was issued has been secured, or final judgment has been rendered in the action" (§ 644).

"Where two or more warrants of attachment against the same defendant are delivered to the Sheriff of the same county, to be executed, their respective preferences, and the rules where a levy, or a levy and sale, have been made under a junior warrant, are the same, as where two or more executions, against the property of the same defendant, are delivered to the Sheriff of the same county, to be executed" (§ 697).

"Where two or more executions against property are issued, out of the same or different Courts of record, against the same judgment debtor, the one first delivered to an officer to be executed has preference, notwithstanding that a levy is first made, by virtue of an execution subsequently delivered; but if a levy upon and sale of personal property has been made, by virtue of the junior execution before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the latter" (§ 1406).

"Where there are one or more executions, and one or more warrants of attachment, against the property of the same person, the rule prescribed in the last section prevails in determining the preferences of the executions or warrants of attachment; the defendant in the warrants of attachment being, for that purpose, regarded as a judgment debtor" (§ 1407).

These provisions were considered in the case of Pach *v.* Gilbert (124 *N. Y.* 612), in which it was held that where the levy had been made by virtue of a junior attachment it inured to the benefit of the judgment creditor whose attachment was first delivered to the sheriff. As it appears to us, that case disposes of the question under consideration. It is true it is distinguishable from

this in the fact that no levy had been made upon the senior attachment, and in this case a partial but insufficient levy had been made upon the plaintiff's attachment. 'We can, however, discover no distinguishing features as to the legal aspect of the two cases. The language of the provisions of the Code is clear and unequivocal. It admits of but one interpretation. That has been fully expressed in the case referred to. The policy of the law is to give the creditor the preference to which his diligence entitles him. Whilst an attachment may not become a lien upon the personal property of the defendant until actual levy, as soon as levy is made the lien attaches, and under the provisions of the Code it inures to the benefit of the attaching creditors in the order of their priority, which is determined by the order of the delivery of the attachments to the Sheriff. The Sheriff is given no option in the matter. If the respondent's contention is correct, a Sheriff may make a levy of the senior attachments upon property of but little or trifling value, and then reserve the remainder and the substantial part of the property of the defendant to apply in his discretion upon junior attachments, thus giving the last attaching creditor a preference over the first. This would be in violation of the legislative will and intent, and ought not to be permitted. The failure of the Sheriff to levy upon sufficient property to satisfy the plaintiff's execution leaves the plaintiff, as to the deficiency, in the same position as if no levy had been made, and to the extent of such deficiency he has a right to demand of the junior attaching creditors the priority which the Code has given him.

The order appealed from should be reversed and the motion granted, with costs in all the Courts.

All concur, except VANN, J., not sitting.

Order reversed.

# FREDERICK STURZ *v.* FREDERICK T. FISCHER.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, JANUARY, 1896.

§§ 636, 641, 683.

*Attachment—alternative grounds—motion to vacate warrant.*

An application, or notice, to vacate a warrant of attachment on the papers upon which it issued, may be heard at the Special Term of the Supreme Court (Part II.) for the transaction of *ex parte* business.

An application to vacate a warrant of attachment, when founded only on the papers upon which the warrant was granted, if the warrant was granted by a Judge out of Court, must be made to the same Judge, in Court or out of Court, and with or without notice, as he deems proper.

In applying for a warrant of attachment, a statement of two grounds, disjunctively and in the alternative, is a statement of neither ground, since to affirm one or the other proposition is to affirm neither; and in such a case the warrant will be vacated; so where the proposition is that the defendant "has assigned, disposed of or secreted" his property.

*Held*, that only a single ground of attachment is stated; that is, by putting his property beyond the reach of creditors, no matter by which means, whether by disposing of, assigning or secreting it, the debtor subjects it to attachment.

Where the disjunctive "or" is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact attended with the same result, but a single ground of attachment is stated. Smith *v.* Wilson, 76 *Hun*, 565, followed; Cronin *v.* Crooks, 143 *N. Y.* 352, distinguished.

(*Decided January*, 1896.)

Motion to vacate a warrant of attachment.

*Leopold Leo*, for motion.

*Hastings & Gleason, contra.*

PRYOR, J.—The application being, on notice, to vacate a warrant of attachment on the papers upon which it issued, the preliminary question is presented, whether the motion can be entertained by the Justice presiding in Part II. of the Special Term.

By Rule I., Appellate Division Rules, "litigated motions" must be heard in Part I. By Rule V., "application for all Court orders *ex parte* * * * or *where notice is not required*, must be made to the Special Term for the transaction of *ex parte* business."

An application to vacate an attachment, when founded only on the papers upon which the warrant was granted, if the warrant was granted by a Judge out of Court, must be made to the same Judge, in Court or out of Court, and with or without notice, as he deems proper. *Code*, § 683. "Litigated motions," as intended in Rule I., I take to be motions which can be heard only on notice. As this application may be heard "with or without notice," manifestly notice "is not required"; and so by Rule V. it may be heard at the Special Term for the transaction of *ex parte* business.

By section 641 of the Code, "the warrant must recite the ground of the attachment," else it is void. Cronin *v.* Crooks, 143 *N. Y.* 352. In the case before me, the recital of the ground of attachment is, that the defendant "has assigned, disposed of or secreted his property," etc. In Cronin *v.* Crooks (*supra*) the Court held that a statement of two grounds disjunctively and in the alternative, is a statement of neither ground; since, obviously, to affirm one or the other proposition is to affirm neither. A statement that an attachment proceeds upon one or the other of two distinct grounds fails to indicate upon which ground it proceeds. It stands not upon the one but upon the *one or the other*,

and the averment leaves in question whether upon the one ground or upon the other.

Hence, if defendant's position be valid, that the warrant in controversy exhibits alternatively two distinct grounds of attachment, there would be no escape from the conclusion for which he contends.

But, as well upon reason as authority, the proposition that the defendant "has assigned, disposed of or secreted" his property, involves a single ground of attachment only. It is by putting his property beyond the reach of creditors, no matter by which means, whether by disposing of, assigning or secreting it, that the debtor subjects it to attachment. The baffling of creditors is the controlling fact, and it exists whether by one expedient or another of those mentioned in the clause. The three agencies of fraud in the group, namely, assigning, disposing of and secreting, are legally identical and equivalent. Van Alstyne *v.* Erwine, 11 *N. Y.* 331, 339. "Secreting does not mean hiding alone, but any making away with property which shall put it unlawfully out of the reach of the creditor." 21 *Am. & Eng. Ency. of Law*, p. 994. One may secrete property by putting legal impediments in the way of creditors. Gault *v.* Dupault, 4 *Can. Leg. News*, 321. Where the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact attended with the same result, but a single ground of attachment is stated. *Drake on Attach.*, § 102. In Garson *v.* Brumbery, 75 *Hun*, 336, it was held that a warrant is not invalidated by the recital of these grounds of attachment, namely, that "the said defendant did depart from the State with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent." In Smith *v.* Wilson (76 *Hun*, 565), the precise point in controversy was adjudicated, the Court holding that the statement in a warrant of attachment

that "the defendants have assigned, disposed of or secreted their property" is a recital of one class only of the grounds set forth in § 636 of the Code and is sufficient. The defendant contends, however, that the authority of this ruling is discredited by the decision of the Court of Appeals in Cronin *v.* Crooks (*supra*). But the cases are not identical. In the latter the recital in the warrant was that the defendant "has assigned or disposed of, or is about to assign or dispose of her property." Were the recital in the warrant under review the same, then, of course, Cronin *v.* Crooks would control the decision.

Contrary to first impression, my conclusion is that the warrant is valid.

Motion denied.

---

## PETER HART, Respondent, *v.* ISAAC L. KIP, Appellant.

Court of Appeals, January, 1896.

§ 401.

*Statute of Limitations—interpretation of* § 401, *Code of Civil Procedure.*

Under § 401 of the Code of Civil Procedure, providing that if the party proceeded against in an action has departed from and remains without the State for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action; it must be shown, in order to bring the case within the operation of this section, that the defendant has departed from the State after the cause of action has accrued; that he has been continuously absent from the State for more than one year; and that he has resided without the State.

All these elements must concur in order to suspend the operation of the statute.

A person who has a residence and domicile in this State and departs as a traveler on business or pleasure to another country, remaining absent for a year or more, does not thereby acquire a residence or reside in that country within the meaning and operation of the statute.

(*Decided January*, 1896.)

Appeal from a judgment of the General Term, First Department, affirming a judgment entered upon the report of a referee.

*Isaac L. Miller*, for appellant.

*John R. Farrar*, for respondent.

O'Brien, J.—The plaintiff has recovered upon a claim for services as janitor of a building belonging to the defendant. It is alleged that the services commenced May 1, 1879, and continued till March 1, 1890, when they terminated. The services were rendered, as the plaintiff claims, under an agreement between the parties whereby the plaintiff was to be paid $20 per month.

This action was commenced on the 17th of February, 1893, and one of the defenses interposed is the Statute of Limitations. There was also a general denial and an allegation of payment. The plaintiff, during all the time, had apartments in the building without rent, but the defendant denied that he had employed him as the janitor or that he owed him anything for services. From the plaintiff's own statement he made no demand of the defendant for any compensation for his services during a period of nearly fourteen years, though his pecuniary circumstances were such as would naturally stimulate him to become possessed of the fruits of his labor. On the supposition that the plaintiff had a valid claim against the defendant for his monthly wages, it is somewhat difficult to understand his forbearance to even ask for their pay-

ment. But the referee has given credit to the plaintiff's testimony, and the General Term has approved his findings, and hence we have no right to inquire into the merits of the claim. The defendant's testimony is so general, and his silence as to the exact nature of his defense, whether payment or the absence of any obligation to pay, so inscrutable, that the referee had but little to act upon save the testimony of the plaintiff, which we cannot say that he was bound to discredit.

But we think that the learned Court below and the referee failed to give proper effect to the defense of the Statute of Limitations. As to any claim that accrued to the plaintiff more than six years prior to the commencement of the action, that is to say, prior to the 17th of February, 1887, the statute was, *prima facie*, a bar. In order to avoid this, in whole or in part, the plaintiff proved and the referee found that the defendant was in Europe from May 28, 1890, to November 23, 1892. It appears that he went to Europe frequently during the period covered by the plaintiff's claim, but on this occasion he was absent longer than usual. During all this time, and for many years before, the defendant had a residence and place of business in the City of New York, and on the bare proof that the defendant on this occasion went to Europe and remained absent for about two years and a half, the referee made a finding that he *resided* out of this State. Neither the evidence nor the finding discloses in what particular part of the world outside this State the defendant resided during his absence, and upon the assumption that he was a mere traveler, as he doubtless was, it would be impossible to do so.

Upon these facts it was found as a conclusion of law that the operation of the statute upon the plaintiff's cause of action was suspended during plaintiff's absence, under § 401 of the Code, which reads as follows:

"If after a cause of action has accrued against a per-

son he departs from and resides without the State *and* remains continuously absent therefrom for one year or more, * * * the time of his absence * * * is not a part of the time limited for the commencement of the action."

It will be observed that, in order to bring a case within this section, as amended in 1888, the defendant must depart from the State after the cause of action has accrued. He must also be not only continuously absent from the State for more than one year, but he must *reside* without the State. All these elements must concur in order to suspend the operation of the statute. The defendant, beyond all doubt, had a domicile and residence in the City of New York, and the only proof of residence out of the State that was before the referee was that he departed for Europe on a certain day and returned upon another, more than two years afterwards. He was certainly absent, but there was no other proof that during such absence he acquired a residence or resided elsewhere. The distinction between domicile and residence has no application to the case. It may not have been necessary for the plaintiff to show that the defendant had changed his domicile, but it was necessary to show that he resided without the State, and that fact was not established by mere proof of absence. A person who has a residence and domicile in this State, and departs as a traveler for business or pleasure in another country, does not by his absence acquire a residence or reside in that country. He must while so absent at least take up his temporary abode at some particular place with the intention of making it his home while so absent, and actually reside there. Dupuy *v.* Wurtz, 53 *N. Y.* 556; People *v.* Platt, 117 *N. Y.* 159; De Meli *v.* De Meli, 120 *N. Y.* 485.

Neither a residence or domicile is acquired by a mere visitor from this country traveling from place to place in Europe, all the time intending when the purpose of the

journey is satisfied to return to his home here. So far as the record shows, the defendant's absence was for no other purpose, and was not accompanied by any of the circumstances or conditions necessary to constitute residence elsewhere. While absent he was a mere sojourner in another country, or in many countries, but his residence in every legal sense of the term was in New York. Although he was not actually within the State for more than two years, the plaintiff's right to serve process upon him was not for a moment suspended, since §§ 435 and 438 of the Code provide for such a case. In order to bring the case within the statute the defendant must *reside* without the State, and we cannot perceive that the Courts below have given any effect whatever to that word, since the decision proceeded upon the ground that absence was sufficient to suspend the operation of the statute. The residence of a party is presumed to be where his domicile is, though he may be temporarily absent, until some facts are shown to change the presumption, or to justify a finding that he has taken up another residence elsewhere. In this case no proof was given from which it could be found that the defendant resided at any other place than that of his domicile, and hence a material finding of the referee is unsupported by evidence. The statute, however, was not interposed as a defense to the whole claim, but only to that part of it in excess of the sum of $720, and to that extent only can the judgment be said to be erroneous.

The judgment should be reversed and a new trial granted, costs to abide the event, unless the plaintiff stipulate to reduce the recovery to $720, with interest from March 1, 1890, and, in that event, the judgment, as so modified, should be affirmed, without costs to either party.

All concur.

Judgment accordingly.

## PEOPLE OF THE STATE OF NEW YORK, APPELLANT, v. EQUITABLE MUTUAL FIRE INSURANCE CORPORATION OF NEW YORK, RESPONDENTS.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JANUARY, 1896.

§§ 1785, 1786, 1788, 1810.

*Application for the appointment of temporary receiver of mutual fire insurance corporation—what facts must be presented.*

The duty of the Attorney-General to apply for and the authority of the Court to appoint a receiver of an insolvent corporation are regulated by the Code of Civil Procedure; but a clear case of violation of law, actual insolvency, insufficiency of assets to justify the continuation of business, or acts showing that the affairs of the corporation are being carried on fraudulently or unlawfully, must be presented before the Court will interfere.

Capital stock notes of a mutual fire insurance corporation, in the form and certified as required by statute, stand as capital or as security for all losses and claims until the accumulation of invested profits equals the amount of cash capital required to be possessed by stock fire insurance corporations; and are to be taken into account in the ascertainment of the financial condition of the company.

Conceded improprieties and irregularities on the part of certain officers of the corporation, *Held*, not a ground for the appointment of a temporary receiver where it appeared that the same had been repudiated by formal resolutions, and reparation for such wrongs had been tendered upon their discovery.

Although in suits to dissolve mutual fire insurance companies there may be instances in which immediate action is called for, in a doubtful case the ability and offer of the company to restore its impaired capital, by supplying funds to any amount directed by the Insurance Department, are circumstances proper to be considered upon the application for the appointment of a temporary receiver.

(*Decided, January,* 1896.)

Appeal from order entered at Special Term of the Court of Common Pleas denying plaintiff's motion for a temporary receiver of the defendant corporation.

*Theodore E. Hancock*, for appellant.

*Kerneson, Crain & Alling*, for respondents.

PATTERSON, J.—We see no good reason for differing with the Court below in its conclusion not to appoint a receiver *pendente lite* of the defendant corporation. The grounds of the application made by the Attorney-General were that the defendant was insolvent and unable to pay its debts and had violated various provisions of the laws under which it was incorporated and of statutes of the State binding upon it, whereby it incurred a forfeiture of its rights and franchises and became liable to a judgment of dissolution; and the affidavits of Messrs. McCabe and Gordon, upon which the motion was founded, allege as reasons for a receivership that there are funds and property of the corporation in various forms which need immediate care and attention and should therefore be placed in the custody of the Court.

The duty of the Attorney-General to apply for and the authority of the Court to appoint a receiver of such a corporation as this are matters of statutory regulation (*Code Civ. Pro.*, §§ 1785, 1786, 1788, 1810); but a clear case of violation of law, actual insolvency, insufficiency of assets to justify the continuation of business or acts showing that the affairs of the corporation are being carried on fraudulently or unlawfully, must be presented before the Court will interfere. In this case the action of the Court is asked for on two principal grounds of complaint, namely, that the defendant, a mutual fire insurance corporation, was at the time this action was begun insolvent, having an excess of indebtedness over assets of $53,091.19.

and that it has violated the law in that twenty per cent. of the capital stock notes was not paid in cash as required by the insurance law.

The exhibit of the company's affairs from which the conclusion is drawn by the plaintiff that it is insolvent, is contained in a report annexed to the complaint, made to the Superintendent of Insurance by official examiners, and upon the basis of the unqualified adoption of that report insolvency of the corporation would appear. But the examiners omitted to credit the corporation with $160,000 of capital stock notes, such as are authorized by the law under which this defendant was organized and is doing business. All those notes are now in the possession of the company. They are in the form and certified as required by the statute. They are held as security for losses and claims. No assessment has ever been made upon them, and the makers are liable thereon for the full amount thereof. Mr. Walton, the secretary of the company, swears "that upon the organization of the defendant, it had, in compliance with law, 400 applications for insurance, premiums on which amounted to $200,000, of which $40,000 was paid in in cash and notes of solvent parties founded on actual and *bona fide* applications for insurance for $160,000." Why these notes are entirely ignored is not made to appear. They stand as capital or as security for all losses and claims until the accumulation of invested profits equals the amount of cash capital required to be possessed by stock fire insurance corporations; the liability of the makers being proportionately reduced as profits accumulate, and are to be taken into account in the ascertainment of the financial condition of the company. Giving the defendant the benefit of this asset, the charge of insolvency falls to the ground.

The second serious charge upon which the decision of the motion under review was based is that the defendant violated the law by non-compliance with that provision

of the statute which requires twenty per cent. of the $200,000 of premiums referred to in section 111 to be paid in in cash before the company may begin business. Under that requirement, the defendant was bound to have available for all purposes the sum of forty thousand dollars in cash when it began transacting business. Its officers reported to the Insurance Department that it was possessed of that amount. The examiners of the Insurance Department have declared that the report was false, and that instead of having that amount of cash on hand, they merely held four hundred sight drafts of one hundred dollars each which were deposited with the Tradesmen's Bank, in the City of New York, and Hopkins, an accountant, swears that he was told by the manager of the company that these four hundred drafts were never paid, but that forty thousand dollars was borrowed on them by the company from the bank. Mr. Skinner, the manager, denies having made that statement, and other affidavits show that the company never had any relation whatever with the bank as to these drafts, except to receive the credit as cash of the proceeds of the four hundred drafts, which, by arrangement between the bank and the makers of the notes, were, without any intervention of the company, received on deposit as a cash asset of the company and credited as cash on the bank pass-book of the company. This fact seems established by abundant evidence, and the bank credit existing, the company was entitled to its use and could draw for the full amount in money as and when it was needed. The subsequent history of the company's relations with the Tradesmen's Bank is not controlling upon the particular subject of fraud or non-compliance with law at the time the company began business now under consideration. That some officers of the corporation committed gross improprieties and irregularities must be conceded, but as soon as the directors became aware of them, those acts

were repudiated by formal resolution of the directors. Some of these acts were highly reprehensible. The check for $12,500 given on August 6th, 1894, purporting to be for return premiums, but in reality given to take up one hundred and twenty-five of the sight drafts, was a great wrong, but it was without authority. And the giving of the check for $21,400 to the American Exchange Bank to secure two hundred and fourteen similar drafts was equally culpable, but that act was also disavowed. Reparation for these wrongs is, however, tendered. Readiness, willingness and ability to make good the impairment are shown, and the company has given notice to that effect to the Insurance Department and has claimed the benefit of the thirty days' grace of the statute in which to accomplish that object. We have no reason to doubt the sincerity and good faith of the offer. We do not assent to the view that section 43 of chapter 690 of the Laws of 1892 operates as a limitation upon those provisions of the Code of Civil Procedure defining the cases in which the Attorney-General may institute an action of this character. There may be many cases where immediate action is called for and where a delay of thirty days might work irreparable injury. In a doubtful case, however, such as the present, we consider that the ability, and the offer of the company to restore its impaired capital by supplying funds to any amount directed by the Insurance Department, are circumstances proper to be considered upon the application. With the other facts to which we have adverted, they furnish an additional reason for the exercise by the Court of its discretion adversely to the appointment of a receiver.

The order appealed from, under the condition upon which it was granted, should be affirmed, with $10 costs and disbursements.

All concur.

## JOHNSON *v.* COCHRAN *et al.*

SUPREME COURT, GENERAL TERM, SECOND DEPARTMENT, DECEMBER, 1895.

§§ 713, 2653 A.

*Action to determine the validity of probate of a will—appointment of receiver pendente lite.*

The subject of an action brought to determine the validity of a will under § 2653 A of the Code of Civil Procedure is the validity of the will itself and not the specific property devised by the will, and an order appointing a receiver to preserve such property *pendente lite* under § 713 of the Code will be set aside.
(*Decided December*, 1895.)

Appeal by defendants from an order of the Special Term, Kings County, appointing a receiver of the property of the testator pending an appeal from a judgment declaring said testator's will to be invalid.

*Hugo Hirsh*, for appellant.

*M. L. Towns*, for respondent.

BROWN, P. J.—This action was brought under chapter 591, Laws 1892, known as § 2653 A of the Code of Civil Procedure. Judgment was entered in favor of the plaintiff in the clerk's office of Kings County on May 21, 1894. The purpose of the action was to determine the validity of the last will and testament of Joseph H. Hamilton. The statute provides that "the issue of the pleadings in such actions shall be confined to the question whether the writing produced is or is not the last will * * * of the testator." The judgment entered followed the language of the statute, and decided that the writing produced and

admitted to probate by the Surrogate was not the last will and testament of said Joseph H. Hamilton, and adjudged said probate and all proceedings had thereon to be invalid, null and void.

The order appealed from cannot be sustained. Section 713 of the Code of Civil Procedure authorizes the appointment of a receiver after final judgment to preserve the property which is the subject of the action during the pendency of an appeal. But the property of which the receiver was appointed, and which is described in the order as "No. 975, Bergen Street," was not the subject of the action. The subject of the action was the validity of the will of Joseph H. Hamilton; and while the judgment is conclusive as to the title of the real and personal property of the testator, it does not deal with or relate to the possession of any specific property of which the testator died seised; and the plaintiff could not, under any process that could be issued to enforce the judgment, obtain possession of the real estate in question. The effect of the judgment upon the rights of the parties is to leave them in the same situation they would have occupied if the testator had died intestate. The title to the property passes to the heirs at law, and possession must be recovered in the proper form of action for the recovery of the possession of real estate. Neither can the land be sold under the judgment in this action, and the proceeds distributed. The statute does not authorize such a judgment, and none has been given.

A Court of Equity undoubtedly possesses the power, independent of statute, to appoint a receiver to preserve property *pendente lite;* but such power can be exercised only in cases where the property is the direct subject of the action, and where the judgment to be granted will act upon the specific property. Probably, all cases that could arise where an appointment of a receiver by a Court of Equity would be proper are now included in the provisions

of the Code. This is not a proper case for such an appointment, and the order must be reversed, with $10 costs and disbursements.

All concur.

---

## ISEAR *v.* McMAHON *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§§ 454, 490.

*Uniting of actions against two or more persons severally liable upon the same written instrument.*

A demurrer to a complaint on the ground that it appears upon the face of the complaint that causes of action have been improperly united must point out specifically the particular defect relied upon, as required by § 490 of the Code. A statement of the ground of the demurrer in the language of the subdivision in question is not sufficient.

Upon a construction of § 454 of the Code of Civil Procedure, which provides that "two or more persons, severally liable upon the same written instrument,* * * whether the action is brought upon the instrument or by a party thereto to recover against other parties liable over to him, may all, or any of them, be included as defendants in the same action at the option of the plaintiff."

*Held*, that said section is not confined in its operation to actions where the defendants are severally liable for or in respect to the same indebtedness, but that an action may be maintained against ten underwriters on a policy of insurance, each of whom, "acting separately, and not one for the other or for any of the others," agrees to insure the plaintiff to the extent of the sum set opposite his name.

(*Decided February*, 1896.)

Demurrer to an action brought on a policy of insurance,

on the ground that causes of action have been improperly united.

*Albertus Perry*, for the plaintiff.

*Menken Brothers*, for the defendants.

BEEKMAN, J.—This action is brought against ten defendants as underwriters of a policy of insurance, under which they undertook to insure the plaintiff against loss or damage by fire to certain property therein mentioned, for the term of one year from the 16th day of October, 1894, to an amount not exceeding in the aggregate the sum of $2,500. While all the underwriters united in the execution of the policy, they did not assume any joint liability for the amount of the loss, nor are they severally liable for the whole amount of the insurance, but each one "acting separately, and not one for the other or for any of the others," agrees to insure the plaintiff to the extent of the sum set opposite his name, to wit, $250. The plaintiff sets out the contract of insurance, alleges a loss within the terms of the policy and its adjustment with the underwriters, and asks judgment against the defendants for the amount thereof. One of the defendants demurs to the complaint on the ground that it appears upon the face of the complaint that causes of action have been improperly united. The demurrer is bad upon its face, in view of the fact that it fails to comply with § 490 of the Code of Civil Procedure, which requires that an objection taken by demurrer under subdivision 7 of § 488 must point out specifically the particular defect relied upon. A statement of the ground of the demurrer in the language of the subdivision in question is not sufficient. However, this objection was not raised upon the argument, and as the question is one of considerable importance, involving other litigations than the one now before me, and has been fully

argued by counsel on both sides, I have determined to disregard the defect and to consider the issue intended to be raised as if it had been properly set forth in the demurrer. The claim of the defendant is that the complaint states a separate, distinct and independent cause of action against each one of the defendants; that none of the defendants is in any way concerned in or affected by a claim against the others, or by the event of the action as to them or any of them; that each is, therefore, a stranger to the controversies between the plaintiffs and the others; and that consequently, within well established principles, these causes of action are improperly united in one suit. Upon the other hand, the plaintiff contends that the action is well brought under § 454 of the Code of Civil Procedure, which provides that "two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument or by a party thereto to recover against other parties liable over to him, may, all or any of them, be included as defendants in the same action, at the option of the plaintiff." A question is therefore presented requiring the construction of this section. Is it confined in its operation only to actions where the defendants are severally liable for or in respect to the same indebtedness? I do not see any sound reason why such a limitation should be imposed upon this section. It is not within its letter, and according to the view which I take of it, not within its spirit. The section is highly remedial in its character, and was obviously intended to prevent a multiplicity of actions and to provide for the settlement in one suit of claims which the plaintiff might have against various parties arising out of the same contract. The convenience of the rule is apparent. Debts so arising, although they may constitute separate causes of action in respect to the several parties uniting in the execution of the instrument, have a common origin springing out of the

same subject-matter, and, except in a limited class of cases, the defenses which may exist are common to all the parties. The great economy of time and expense which attends the uniting of such causes of action in one suit is apparent, and as this was the principal motive of the enactment, the section should be construed with great liberality, so as to bring within its scope all cases where several causes of action arise upon the same written instrument. Certainly the case is not one in which the letter of the statute should receive a restricted interpretation. There is nothing in the other sections of the Code bearing upon the question which renders the construction, which I believe to be the correct one, at all inharmonious. Section 455 provides that the joinder of a person as defendant in an action with another person, as prescribed in the section in question, "does not affect his right to any order or other relief to which he would have been entitled if he had been separately sued in the action." Section 456 authorizes a severance of the action whenever it may be desirable so to do. Furthermore, each defendant is at liberty to set up any individual defense that he may have, or any counterclaim (§ 501, *Civ. Pro.*); and the power of the Court to render an appropriate judgment in such a case is ample (§§ 1204, 1205). It is, therefore, impossible to see how the demurrant in this case can in any way be prejudiced by being sued with his fellow-underwriters in one action. He enjoys every right to which he is legitimately entitled and which he would have possessed had the action been brought against him alone. There are comparatively few cases in which the section of the Code in question seems to have undergone examination. The case of Carman *v.* Plass *et al.*, 23 *N. Y.* 286, seems to be the leading one upon the subject. In that case a tripartite indenture was entered into between the plaintiff as lessor, one of the defendants as lessee and the other defendant as guarantor of the performance by the

lessee of the covenants contained in the lease. The lessee having made default in the payment of rent, the action was brought against him and also against the guarantor to recover the same. A demurrer was interposed by the defendants on the ground that no cause of action against the defendants jointly was set forth in the complaint. Judge Denio, in the opinion of Court overruling the demurrer, says that the case comes precisely within the language of § 120 of the Code of Procedure, which was reproduced in § 451 of the present Code; and that the provision relates in terms to cases where a plurality of persons contract several obligations in the same instrument. The case is distinguished from those in which the guarantor had executed a different instrument, and this distinction emphasizes the view that the statute refers not so much to the nature of the contracts as to the manner and form in which they are expressed and embodied. In other words, where they are evidenced by and associated together in a single instrument, they are within the statute which authorizes an enforcement of each under a similar association in one action. It is a matter of common knowledge that within a few years this method of insurance, distinctively known as "Lloyds," has grown to very large proportions. In many cases the number of underwriters amounts to one hundred or more, and it would be a substantial denial of justice to require the insured to bring one hundred or more actions in order to enforce his rights under the policy. This fact should operate most persuasively upon the Court in favor of a construction of the law under which a single action against all may be sustained. An examination of the policy in question shows a community of interest on the part of all the underwriters in the contract. It contains a large number of conditions on the part of the insured in the performance of all of which they have a common concern. After a loss has occurred, the insured is required to give notice of the same to the attorney in fact of all the

underwriters, with whom he is required to deal in all matters affecting the liquidation of the amount. In fact the whole scheme of the insurance, from its very inception down to the liquidation of the amount due upon the loss, contemplates action on the part of the underwriters exclusively through a common agent, designated as the general manager or attorney in fact. The community of interest is thus a matter of absolute demonstration, and the only differentiation that arises is in respect to the extent of the individual liability. Instead of each underwriter being liable *in solido* for the entire amount of the insurance, he is in terms responsible only for a proportionate part. But all have a common interest in the steps leading up to the ascertainment of the aggregate amount to which the plaintiff is entitled. In fact this common interest in respect to the total liability under the contract is shown in one of the conditions of the policy, where it is said "the liability of each of the underwriters in case of any loss and the amount insured by each underwriter shall be his proportionate part of the aggregate amount payable to the assured upon such loss." For the reasons which I have given, I am of the opinion that the case at bar finds a natural and proper place under the section in question. It is concededly within the letter of the statute, and I think it is equally clear that it is within its true meaning and intent. The demurrer is therefore overruled, with costs, with leave to the defendant to serve an answer within twenty days after the service upon him of a copy of the interlocutory judgment, on payment of costs.

# FOSTER v. ELECTRIC HEAT REGULATOR CO.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§§ 438, 439, 1780.

*Service of summons by publication—order set aside for want of jurisdiction.*

To authorize an order under § 438 of the Code of Civil Procedure, directing service of a summons by publication, on the ground that the defendant is a non-resident, not only is an affidavit of non-residence necessary, but also a verified complaint showing a sufficient cause of action against the defendant to be served, and that the case is one of which the Court can take cognizance.

Where the defect in the first instance is jurisdictional, an order permitting plaintiff to amend his complaint *nunc pro tunc* is of no avail. Ladenburg *v.* Commercial Bank of Newfoundland, 87 *Hun*, 269, followed.

(*Decided February*, 1896.)

Motion by defendant to vacate an order for the service of summons by publication.

*E. A. S. Man*, for plaintiff.

*Oliver C. Semple*, for defendant.

LAWRENCE, J.—In this case, the defendant, for the purposes of motion only, appears and moves to vacate an order for the service of the summons by publication, dated and filed on the 26th day of September, 1895, together with any service of such summons made thereunder. The motion is made upon the papers on file, on the ground of want of jurisdiction in the Justice making said order: First. Because, the Justice making such order was then and there without power to make the same for want

of a verified complaint, showing a sufficient cause of action against the defendant directed to be served. Second. Because this Court was then and there without jurisdiction of the cause of action set forth in the complaint, as appears upon the face of such complaint under § 1780 of the Code of Civil Procedure. Section 1780 of the Code of Civil Procedure provides that an action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation for any cause of action. Section 439 of the Code of Civil Procedure provides that the order of publication must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, etc. It was held by the General Term of this Department in Ladenburg *v.* Commercial Bank of Newfoundland (87 *Hun*, p. 269) that in an action brought against a foreign corporation commenced by attachment, where the cause of action arose without the State of New York, the Supreme Court has no jurisdiction unless the plaintiffs are residents of the State of New York. It was held in the case of Bryan *v.* University Publishing Co. (112 *N. Y.* p. 382) that to authorize an order under the Code of Civil Procedure, § 438, directing service of summons by publication on the ground that the defendant is a non-resident, not only is an affidavit of non-residence necessary, but also a verified complaint showing a sufficient cause of action against the defendant to be served (*Code Civ. Pro.*, § 439), and that the case is one of which the Court can take cognizance. And in Paget *v.* Stevens (143 *N. Y.* pp. 172–177), the Court say that, under the provisions of the Code of Civil Procedure providing for the service of a summons by publication upon a defendant out of the State (§§ 438–439), which require that the order directing such a service shall be founded upon a verified complaint showing a sufficient cause of action against a defendant to be served, it is not sufficient that the complaint set forth facts suffi-

cient to constitute a cause of action; the cause of action must be one of which the Court can take cognizance. It is apparent from these decisions that where an action is brought against a foreign corporation, all the facts required by § 1780 must be set forth in a verified complaint in order to enable the plaintiff to obtain an order of publication, and to give the Court jurisdiction for that purpose. In this case it was necessary, under § 1780, that the plaintiff in his complaint should show that he was a resident of this State. There was no such allegation in the verified complaint which was submitted to the learned Justice who granted the order of publication. On the contrary, it appeared from the contract, which was set forth at length in the complaint, that both plaintiff and defendant were non-residents. The plaintiff relies upon an order made by one of the Justices of this Court, permitting him to amend his complaint *nunc pro tunc;* but as the defect in the first instance was jurisdictional, the amendatory order is of no avail (see Ladenburg *v.* Commercial Bank, etc., 87 *Hun*, p. 274, and cases cited). In the Ladenburg Case it had been held at the Special Term that the defect could be cured by an affidavit filed *nunc pro tunc;* but the General Term, as already stated, did not concur in that view. I am of the opinion, therefore, that this motion must be granted. Settle order on one day's notice.

## IN THE MATTER OF THE APPLICATION OF JOHN QUINN, FOR A WRIT OF HABEAS CORPUS.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, FEBRUARY, 1896.

§ 2059.

*Habeas corpus—appeal by city marshal from order discharging prisoner from custody.*

**In ordinary criminal cases an appeal should not be maintained in opposition to the prosecuting authorities of the people.**
(*Decided February*, 1896.)

Motion by the District Attorney to dismiss appeal from an order of the Special Term, discharging the prisoner.

*Foster L. Backus*, District Attorney (*Lewis L. Delafield* and *Everett Caldwell* of counsel), for the motion.

*George Hoadly* opposed.

CULLEN, J.—It seems to be clear that at common law a writ of error did not lie to review a decision on *habeas corpus* (*Hurd on Habeas Corpus*, 553; Opinion of KENT, Ch. J., in Yates *v.* People, 6 *Johnson*, 337). Still, very early in the history of this State it was held that a prisoner might bring up for review, by a writ of error, an adverse decision on *habeas corpus*, despite the English rule to the contrary (People *v.* Yates, *supra*). We can find no case prior to the Revised Statutes where a writ of error was allowed on the application of the People. By the Revised Statutes (vol. 2, p. 573) the Attorney General was authorized to prosecute such a writ in the name of the People. Now, by § 2059, Code of Civil Procedure, an appeal from a final order discharging a prisoner committed on a

criminal accusation may be taken in the name of the People, either by the Attorney General or by the District Attorney. We do not say that this section is exclusive in all cases, and that there might not arise a case wherein an appeal could not be prosecuted by the custodian of the discharged prisoner. But in ordinary criminal cases we think an appeal should not be maintained in opposition to the prosecuting authorities of the People. The fact that the appellant was a party to the writ, and by the Code is denominated the defendant, did not give him the right to appeal if he had no interest in the subject matter. We think he had not. The case, therefore, falls within the principle of People *ex rel.* Breslin *v.* Lawrence (107 *N. Y.* 607). It is to be distinguished from that of the People *ex rel.* Burnham *v.* Jones (110 *N. Y.*), where it was held that the Land Commissioners might appeal from an adverse decision on a writ of *certiorari.* In that case it was held that the judgment on *certiorari* prevented the Land Commissioners from discharging their duties, and that this fact gave them sufficient interest to justify an appeal. This language is probably broad enough in terms to cover the case of the present appellant, but there is a vital distinction between the two cases. In the case cited the Land Commissioners were the only authorities upon which the public duty as to the matter in hand rested. But the ultimate duty of the conviction and punishment of criminals does not devolve upon peace officers, jailers, or sheriffs. The conduct of public prosecutions in the administration of criminal justice is vested in prosecuting officers, the District Attorney and the Attorney General, and a prosecution should not be maintained in opposition to their action.

The appellant would not be embarrassed in a future action for false imprisonment by the decision on a *habeas corpus.* That decision would not bind him. In fact, it is settled law that, with the exception of a narrow class of

cases, such as the custody of infants, a decision on *habeas corpus* does not create an estoppel, even upon renewals of the writ, and never operates as a former adjudication in other litigations. People v. Brady, 53 *N. Y.*

Motion to dismiss appeal granted.

All concur.

---

## JACKSON v. BRADHURST *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§ 1540.

*Action for partition-creditor's lien attaches only to debtor's share where partition is made, but to the whole premises, where a sale is made.*

Section 1540 of the Code of Civil Procedure, providing that where a partition of property has been made, pursuant to a judgment therefor, "the lien of a creditor, whether such creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached," is intended to apply only to a case where an actual partition is made, and not to a case where a sale is made. And a *lis pendens* previously filed against the share of one party constitutes a cloud upon the title to the whole premises, for which a purchaser at the partition sale may move to set aside said purchase.

(*Decided February* 14, 1896.)

Motion to set aside a purchase made at a partition sale on the ground that a *lis pendens* previously filed constitutes a cloud upon the title.

*Hays & Greenbaum*, for purchaser, Morris Finn.

*Charles A. Jackson*, for plaintiff.

*William J. O'Leary*, for defendants.

TRUAX, J.—On the 17th day of February, 1892, prior to the filing of the *lis pendens* in this action, which is an action of partition, a *lis pendens* was filed in an action brought by one Mary E. Smith against the above-named Charles C. Bradhurst, in an action to enforce the specific performance of a certain contract, by which the said Charles C. Bradhurst agreed to give a mortgage upon his interest in certain premises which were afterwards sought to be partitioned in this action. The above-named Mary E. Smith was not made a party to this action. There was no advertisement in this action for liens upon the undivided shares of the various parties, and the *lis pendens* in the action of Smith against Bradhurst is still upon the interest of the said Bradhurst. Certain premises were sold under the decree in this action and purchased by the moving party, who now seeks to have said purchase set aside, upon the ground that the *lis pendens* filed in the action of Smith against Bradhurst is a cloud upon the title to said premises. Section 1540 of the Code of Civil Procedure provides that "the plaintiff may, at his election, make a creditor, having a lien on an undivided share or interest in the property, a defendant in the action. In that case he must set forth the nature of the lien, and specify the share or interest in which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached, which must be first charged with its just proportion of the costs and expenses of the action in preference to the lien." This section of the Code was intended to apply only to a case where an actual partition is made, and not to a case where a sale is made. The sections of the Code relating to partition make a

difference, between an actual partition and a sale. For instance, by § 1532, which is the first section of the article of the Code relating to actions for partition, it is provided that two or more persons holding as joint tenants or tenants in common may maintain an action for partition according to the respective rights of the persons interested and for the sale thereof if it appears that partition cannot be made. From this section it appears that a sale is only to be made in case an actual partition cannot be made. Section 1540 does not apply to the case of a sale because it does not use the word "sale," nor does the language "that the liens shall attach only to the share or interest assigned" contemplate the case of a sale and distribution of the proceeds. The share is only assigned to the party where actual partition is made. In other cases there is a distribution of the proceeds.

Motion granted.

---

## MORTON, ETC. v. CHESLEY.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§ 1695, 1722, 1726, 1730.

*Order of arrest in action of replevin—Complaint must state specifically the value of the goods.*

Where, in an action by one partner against the administrator of a deceased partner for the recovery of certain books of account, an order of arrest has been granted, and the complaint contains no definite allegation of the value of the books, such omission is a defect for which the order of arrest will be vacated.

The statement of some specific sum due in an action of this character

is necessary to authorize an order of arrest, for the reason that the amount of bail in which defendant is to be held is controlled by the alleged indebtedness.

(*Decided February*, 1896.)

Motion to vacate an order of arrest.

*Blair & Rudd*, for plaintiff.

*Norwood & Dilley*, for defendant.

LAWRENCE, J.—This is an action of a sole surviving partner to recover the possession of certain books of account, the property of the partnership. The defendant is the administrator of the deceased partner. The arrest was granted upon an allegation that the defendant had removed a part of these books from the State of New York, so that they could not be found or taken by the Sheriff. The motion is made upon the papers upon which it was granted, namely, the complaint and certain affidavits. There is no positive allegation of the value of the books in the complaint, and this is claimed to be a fatal defect on the authority of Crotty *v.* Kimball (22 *W. D.* 433), and Gordon *v.* Fox (18 *Civ. Pro.* 291). In Crotty *v.* Kimball the order of arrest was granted upon the complaint and affidavit of one of the plaintiffs, in which it was alleged that the defendant, who was an attorney-at-law, had been employed by the plaintiffs, as administratrices of an estate, to appear for them and represent them in closing up said estate, and that in the course of his employment defendant received the sum of $6,123.23, belonging to said estate; that plaintiffs had frequently demanded of defendant the said sum, with interest, less different amounts defendant had, from time to time, paid out by direction of plaintiffs, but that defendant had refused to pay the same, though admitting that there was a large unexpended balance remaining of said amount. There was, however, no statement made of any specific sum alleged to be due. The

General Term of this department, BRADY, J., delivering the opinion, held: "That the statement of some specific sum due in an action of this character is essentially necessary to authorize an order of arrest, for the reason that the amount of bail in which defendant is to be held is controlled by the alleged indebtedness." Gordon *v.* Fox was an action for the specific performance of a contract for the transfer of an interest in a patent, the plaintiff alleging that the value of the interest is $250,000, but stating no facts justifying that assertion. It was held by BARRETT, J., at Special Term, that there was nothing alleged to show the value of the patent, and that an order of arrest granted under § 550 of the Code of Civil Procedure should be vacated, for the reason that there was nothing upon which to fix bail. In Thompson *v.* Gould (16 *Abbott's Practice, N. S.* 424) it was held that in an action for damages for refusal to receive and pay for certain gold contracted for by defendants, an allegation of damages in the complaint in the words that by said refusal plaintiff-assignee was damaged in the sum of $567,000, without, as matter of fact, showing how that or any damages arises, was insufficient to give defendants notice of the question to be tried, and a demurrer to such complaint for want of sufficient cause of action was sustained. The only averment in this case bearing upon the question of value is contained in paragraph eighth of the complaint, which is as follows: "That by reason of the wrongful taking and detention of said books, plaintiff has suffered damage in the sum of $1,000." If the cases above cited are applicable to this case, this allegation would appear to be too indefinite to enable the Court to fix the amount of bail. Section 1695 of the Code of Civil Procedure, subdivision 6, requires a plaintiff in an action of replevin to state the actual value of the property. Section 1722 provides for the recovery of damages for injury to or depreciation of a chattel while in the defendant's possession, and requires

that in that case he must set forth the facts in his complaint and demand judgment for damages accordingly. Section 1726 provides that the verdict, report or decision must fix the value of the chattel where the chattel has not been replevied, and § 1730 makes the value thus determined an element of the judgment. I agree with the counsel for the defendant that, the element of value thus being an issue in the case, it should have been pleaded. See, also, Westervelt *v.* Agramaria, 58 *Hun*, 147. For these reasons, I am of the opinion that the order of arrest should be vacated, with costs to the defendant.

---

## MANHATTAN RAILWAY CO. *v.* O'SULLIVAN *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§§ 1347, 3382.

***Stay on appeal from order setting aside the award of commissioners.***

**An order of the Special Term, setting aside the award of commissioners is an order affecting a substantial right, and the Court has power to grant a stay or an appeal from such order.**

(*Decided February*, 1896.)

Motion by defendant for stay on an appeal from an order of the Special Term setting aside the award of commissioners.

*Davies, Short & Townsend*, for plaintiff.

*Evarts, Choate & Beaman*, for defendants.

LAWRENCE, J.—This is a motion for a stay on an appeal from an order of the Special Term setting aside

the award of commissioners. The order appealed from awarded to the defendants $75,000. That order has been set aside and new commissioners appointed in the proceeding. The trial before the old commissioners occupied several months and involved large legal expenses. It is claimed on the part of the railway company that the Court has no power to grant such a stay, for the reason that the order is not a final, but an interlocutory order. I am of the opinion that it is within my power to grant a stay under the general provisions of § 1347 of the Code of Civil Procedure. The order affects a substantial right, and it would seem to be a great hardship to compel the property-owners to go on with another proceeding, before a new set of commissioners, before having the question determined whether the order setting aside an award for $75,000 was or was not erroneous See, also, § 3382 of the Code of Civil Procedure. Motion granted upon condition that the appellants stipulate to argue the appeal before the Appellate Division at the March term and give an undertaking to pay all costs and damages not exceeding the sum of $500.

Settle order on one day's notice.

## JAMES LAWLOR v. MAGNOLIA METAL CO.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§ 709.

*Attachment—Sheriff's fees—by whom paid.*

Plaintiff obtained an attachment on the ground that the defendant was a foreign corporation. Defendant filed an undertaking, and an order was entered discharging the attachment. On a motion by defendant for an order directing the plaintiff to pay the Sheriff's fees, *Held*, that the Sheriff is entitled to be paid his fees by the defendant before he can be called upon to surrender the property upon which the attachment was levied.

(*Decided February*, 1896.)

Motion by defendant for an order directing the plaintiff to pay the sheriff's fees upon an attachment.

*Constant & Coghill*, for plaintiff.

*Nichols & Bacon*, for defendant.

*Tracy, Boardman & Platt*, for Sheriff.

LAWRENCE, J.—The plaintiff obtained an attachment for $35,710.40, on the ground that the defendant was a foreign corporation. Defendant filed an undertaking, and an order was entered on the 29th of January, discharging the attachment. No exceptions have been taken to the undertaking, but the Sheriff refuses to deliver up the property until his fees are paid for poundage and care of the property; and a motion is now made by the defendant, upon the undertaking and order discharging the attachment, that the plaintiff should be directed to pay the Sheriff's fees, and that such fees be taxed. It is conceded that the

Sheriff is entitled to his fees, and the only question is as to the amount thereof. I confess that if this question had not been passed upon by the Court in other cases, I should incline to the opinion that where the defendant gives an undertaking, pursuant to the provisions of § 688 of the Code of Civil Procedure, the intention of the Legislature was that the undertaking should stand in place of the attachment, and that the same should be in a sufficient sum to cover the Sheriff's fees; in other words, that the effect of giving the undertaking, duly approved by the Court and accepted by the plaintiff and the Sheriff, would be the same as an absolute vacatur or discharge of the attachment. It has, however, been expressly decided that under chapter 418 of the Laws of 1892, amending chapter 523 of the Laws of 1890, where an undertaking is given by the defendant for the purpose of discharging the attachment, under § 709 of the Code of Civil Procedure, the Sheriff may retain the property until his fees are paid by the defendant. See opinion of INGRAHAM, J., in Union Square Bank *v.* Reichmann (*Law Journal*, September 11th, 1895). In that case the attention of the learned Justice was called to the cases relied upon by the defendant on this motion, and particularly the case of Bowe *v.* The Reflector Co. (36 *Hun*, 407); but it was held that those cases did not apply, for the reasons that the attachments therein considered had been vacated absolutely and were not discharged because of the substitution of other security. To the same effect is the decision of Mr. Justice BARRETT in Herrera *v.* Barreto (*Law Journal*, May 10th, 1894); and see also the opinion of ANDREWS, J., in Colberg *v.* Emerson (*Law Journal*, March 6th, 1894). Section 709 of the Code of Civil Procedure provides that where a warrant of attachment is vacated or annulled, or an attachment is discharged upon the application of the defendant, the Sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the

defendant or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges and expenses legally chargeable by the Sheriff, all the attached personal property remaining in his hands, etc. I shall follow the construction which has been given to the Laws of 1890, 1892, and to this section of the Code of Civil Procedure in the cases above referred to, and shall hold that the Sheriff is entitled to be paid his fees by the defendant before he can be called upon to surrender the property upon which the attachment has been levied. It was agreed upon the argument of the motion that the parties should stipulate as to the value of the property attached, or, if that could not be done, that an inventory should be taken of the property and the value fixed thereby. I will hear counsel upon the question of the amount of the Sheriff's fees upon the settlement of the order to be entered on this decision. The motion of the defendant that the plaintiff pay the Sheriff's fees will therefore be denied, but without costs.

Settle order on one day's notice.

---

## BARBIG *v.* KICK *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM, SEPTEMBER, 1895.

§§ 1629, 1630.

*Foreclosure of mechanic's lien—action on debt secured thereby—remedies not cumulative and concurrent.*

Under § 1630 of the Code of Civil Procedure, taken in conjunction with section 8, chapter 342. Laws 1885, where a debt is secured by a mechanic's lien, and a judgment has been recovered for the

**debt, the return of execution unsatisfied is an indispensable condition to the maintenance of an action to foreclose the lien.**

**The remedies by action for the debt secured by a mechanic's lien, and foreclosure of the lien are not cumulative and concurrent. and the lienor, if he chooses to pursue the legal remedy, must exhaust it before he can have recourse to equitable relief.**

(*Decided September*, 1895.)

Demurrer to complaint in action for the foreclosure of a mechanic's lien.

*John Mulholland*, for plaintiff.

*George Haas*, for defendant.

PRYOR, J.—Action by sub-contractors against owner and contractor for foreclosure of a mechanic's lien. Demurrer by contractor-defendant. The complaint shows a judgment against the contractor-defendant for the debt secured by the lien, but omits to allege issue or return of execution. This defect the demurrer affirms to be fatal to the defense. Upon principle the lien is a security for the debt, and a judgment for the debt is no bar to the enforcement of the security. The remedies by action for the debt and foreclosure of the lien are cumulative and concurrent, and the creditor may pursue both until he obtains satisfaction. Pollock *v.* Ehle, 2 E. D. Smith, 541; Hall *v.* Pettigrove, 10 *Hun*, 609. The defendant concedes the law to be so if not changed by statute; but he contends that by § 8, c. 342, Laws 1885, the return of the execution unsatisfied is an indispensable condition to the maintenance of the action to foreclose the lien. The section provides that "the manner and form of instituting and prosecuting any such action * * * shall be the same as in actions for the foreclosure of mortgages upon real property." By § 1630 of the Code, an action to foreclose such mortgage "shall not be commenced or maintained" until the return of execution unsatisfied.

The precise point for adjudication is: Does the act of 1885, in conjunction with § 1630 of the Code, preclude enforcement of the lien until issue and return of execution? In the foreclosure of a mortgage the complaint must state whether any other action has been brought to recover any part of the mortgage debt (*Code*, § 1629); and if in such action judgment has gone for the plaintiff, he cannot commence or maintain an action to foreclose the lien until the issue and return of execution (§ 1630). If then the procedure in an action to foreclose a lien is to be identical with the procedure in an action to foreclose a mortgage, the issuance and return of an execution is as indispensable in the former as in the latter action. And if the fact of such issuance and return be an essential constituent in the cause of action, an elementary rule of pleading requires its allegation in the complaint. Were the effect of the provisions of the Code to deprive the mortgagee of his right to foreclose, they would not be a mere regulation of procedure, and so since the act of 1885 only assimilates the two actions in procedure, § 1630 might not apply in an action upon the lien. As, however, the right to sue is not abolished, but only suspended until the return of execution, the provision is plainly a rule of procedure. The lienor may maintain an action at law for the debt; but if he chooses to pursue the legal remedy, he must exhaust it before recourse to equitable relief. The equity of the rule is illustrated in the present case. The plaintiff has recovered a judgment for the debt against his contractor; but without an attempt to coerce payment from the real debtor, he seeks satisfaction out of the property of one standing substantially in the situation of a surety. Upon another ground, too, it is apparent that, as against the contractor, the complaint propounds no cause of action. There is no lien upon his property to be foreclosed; nor can there be a recovery against him for the debt, because it is already merged in judgment. Against him, there-

fore, the complaint exhibits no right to relief. Demurrer sustained, with leave to amend on payment of taxable costs.

---

## ESTATE OF JOSEPH P. QUINN.

SURROGATE'S COURT, NEW YORK COUNTY, OCTOBER, 1895.

§ 2730.

*Accounting by testamentary trustee—disbursements for attorney's fees not allowed.*

Under § 2730 of the Code of Civil Procedure, providing that an accounting executor may be allowed upon such accounting "for his actual and necessary expenses as appears just and reasonable," the rule is inflexible that all disbursements which reduce the amount to be distributed to those interested in an estate must be shown to have been necessary to the proper administration of such estate, must be shown to have been actually rendered, and it must be further shown that the amount paid for them was reasonable according to their character and importance, and it may now be said with reference to the results obtained.

(*Decided October*, 1895.)

Motion to confirm referee's report.

*Burr & Coombs*, for plaintiff.

*R. & E. J. O'Gorman*, for testamentary trustee.

ARNOLD, S.—This is an accounting by a testamentary trustee. Upon objections filed a reference was ordered. Upon the hearing proof was made as to one item which had been objected to and the objection was withdrawn, and as to another contested item it was admitted that it should be allowed. As to all the other items excepted to, it was

conceded by the accountant that the objections should be sustained with the exception of certain payments claimed to have been made to counsel for legal services. As to these the contest proceeded and the referee has allowed and credited them to the accountant. Exceptions to such allowances were duly filed and are now insisted on. No bills for the alleged services were ever rendered to the trustee, nor is there any competent evidence of any of the details of the work done, and there are no vouchers for the payments produced except certain checks, which are drawn to the order of and indorsed and appear to have been collected by these attorneys, or one of them. Their aggregate is much larger than the amount which the accountant asks to be allowed to her here, but this is sought to be explained by her statement that the services were in respect to three trust estates, and that she charged to this one only one-third of the whole. The attorney, who seems to have collected this money, died before the petition was filed herein, and there is evidence produced showing that he died insolvent. An executor, trustee or other accounting party may be allowed upon such accounting "for his actual and necessary expenses as appears just and reasonable" (§ 2780, *Code*). Under the sanction of this provision allowance is made for payments to counsel for their services by the accountant, but that class of "expenses" is entitled to no immunity from the inflexible rule that all disbursements which reduce the amount to be distributed to those interested in an estate must be shown to have been necessary to the proper administration of such estate, must be shown to have been actually rendered, and it must be further shown that the amount paid for them was reasonable according to their character and importance, and, it may now be said, with reference to the results obtained. Randall *v.* Packard, 142 *N. Y.* 47. As above stated, no details of the services for which the contested payments were here made are furnished. It is shown that

the trust estate embraced certain houses in this city, that the trustee did not live here, that she was inexperienced in business matters, that she did not and she claims under the circumstances could not be expected to personally take charge of these buildings, that she employed an agent to look after them, collect rents, etc., that orders were made by the Board of Health which required this agent to see her attorney frequently, that she made payments to the trust beneficiaries through the latter, and that she sought his professional advice repeatedly; but all this is mere generalization, no proof of the value of the services given, no dates furnished, no particulars of the time spent, of the labor performed—nothing from which any Court can put a value upon the work and say it is just and reasonable, or in fact upon which any professional witness could fairly predicate any opinion as to the actual work done, its necessity, its results or its value. The trustee is no doubt situated unfortunately; her attorney is dead and she can produce no bills or vouchers except these checks which do not give any information upon their face as to what they were given for, but this state of affairs does not relieve her from the usual burdens on an accounting. Again, much of the work which she claims was performed by counsel—such as payments to beneficiaries, looking after the agent of the property, etc.—was just such work as it was her duty personally to perform and for which she is allowed commissions. If unable or unwilling to perform these duties she should have resigned her office. The exceptions to the referee's report are sustained. In view of the fact that objections were taken which had to be withdrawn, as well as in consideration of the apparent good faith of the trustee in her conduct of the administration, even in respect to her dealings with counsel which have been here criticised, she should not be charged personally with costs.

## *In re* GAINS.

SUPERIOR COURT OF BUFFALO, SPECIAL TERM, DECEMBER, 1895.

§§ 870, 872.

*Examination of adversary before trial—what the affidavit must contain.*

Under § 872 of the Code of Civil Procedure, providing for the examination of an adversary before trial, the affidavit on which the order is based must contain an allegation that the testimony sought to be obtained "is material and necessary for the party making the application," and where the affidavit fails to do so, the omission thereof renders the order void even though it appear from the papers that such testimony is material and necessary.

The allegation that "it is necessary that your petitioner have the privilege of examining said party is not equivalent to alleging that his testimony is "material and necessary" and does not fulfill the requirements of the section.

(*Decided December*, 1895.)

Application to punish defendant for contempt for refusing to answer material questions on an examination before trial under § 872 of the Code.

*Herman Hennig*, for plaintiff.

*Thomas Cary Welch*, for defendant.

TITUS, C. J.—On the 30th day of November, 1895, Herman Hennig, Esq., an attorney of this court, presented the verified petition of A. D. Gains, together with an affidavit of service upon William H. Heath and procured an order for the examination of said Heath, under §§ 870 and 872 of the Code of Civil Procedure. Heath is expected to be a party defendant to an action to be brought by Gains for negligently performing a surgical operation upon

said Gains for stone in the bladder. Heath appeared before the referee, pursuant to the order, but refused, under the advice of counsel, to answer material questions put to him. This application is made for an order adjudging Heath in contempt for such refusal. It is claimed that the petition does not state sufficient facts to confer jurisdiction upon the judge who granted the order.

Section 870 of the Code of Civil Procedure provides:

"That deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court other than a court specified in subdivisions sixteenth, seventeenth, eighteenth and nineteenth of section two of this act, may be taken at his own instance or at the instance of an adverse party, or of a co-plaintiff or co-defendant, at any time before the trial, as prescribed in this article."

So much of § 872 as is material here provides that the affidavit shall set forth:

(1) "If no action is pending, the names and residences of the expected parties thereto."

(3) "The nature of the controversy which is expected to be the subject thereof."

(4) "The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application."

(6) "That the person expected to be the adverse party is of full age and a resident of the state. * * * The street and street number."

It appears from the papers that the applicant, at the time of the operation, was blind, and was put under the influence of anæsthetics, and has no knowledge of how the operation was performed, or who performed it, or in what manner he received the injury of which he complains; that his hip was broken in some way, but how he does not know; and that the injury is of a serious and permanent character. If the affidavit brings the case within § 872

of the Code, there is clearly a necessity shown for an examination of Dr. Heath, the expected party to the action about to be brought, and the granting of the order was within the fair and reasonable discretion of the judge making it. Bank *v.* Sheehan, 101 *N. Y.* 176, 4 *N. E.* 333; Fatman *v.* Fatman (Com. Pl.), 18 *N. Y.* 847.

The defendant claims that no cause of action is stated against Heath or any other person. While the affidavit is inartistically drawn, and the facts are not stated with that degree of precision which is customary in a complaint, yet I think the plain statement of facts contained in it shows that the plaintiff has a cause of action against Heath. It is alleged that Heath and others, whose names are unknown, performed the operation upon him, and that it was unskillfully and negligently performed. The affidavit states in much detail the fact of his being taken to the hospital and of his being operated upon, and of his subsequent ascertainment that his hip was broken. In another respect, I think, however, that the affidavit is defective. It does not state that the testimony is "material and necessary," as required by the Code. It is plain to be seen that the testimony is material and necessary, and in this respect complies with the requirement of rule 83; but it is, nevertheless, not a compliance with the requirement of the law. The rule does not dispense with the necessity of alleging what is required in the Code to be stated in the affidavit, "that the testimony of such person is material and necessary for the party making the application." Beach *v.* Mayor, etc., 14 *Hun*, 81; Chapin *v.* Thompson, 16 *Hun*, 53. The affidavit contains no allegation which can be construed into a statement that the testimony sought to be obtained is material and necessary for the party making the application. It is alleged that "it is necessary that your petitioner have the privilege of examining said Heath," etc.; but this is not equivalent to alleging that his testimony is material and necessary, and it was so held

in Beach *v.* Mayor, etc., *supra*. The right of a party under this provision of the Code is strictly statutory, and the mode pointed out by the statute must be followed; otherwise, no power is conferred upon the judge to make the order. Heishon *v.* Insurance Co., 77 *N. Y.* 278. I am aware that it has been held in some cases that after an order has been made by a judge, and served upon a party, the proper course to pursue is to move at once to set it aside. That is, undoubtedly, the correct practice; but here the court did not, by reason of a failure of plaintiff to state the necessary facts, get jurisdiction of the person of Heath, and was without power to make the order. As well might the judge grant the order without any of the affidavits required by the statute to confer jurisdiction upon the court, and then claim that a person would be guilty of contempt in failing to obey an order made under such circumstances. The trouble here is that the judge had no power to grant the order on the papers presented, and never obtained jurisdiction over the person of Heath, and consequently the order was void and without force. This is not a mere irregularity in granting the order, which the party waives by appearing in obedience to it, because, as has been stated, no sufficient facts were stated in the affidavit to confer jurisdiction to grant the order. I think, therefore, that plaintiff's motion must be denied, and the order vacated and set aside, but without costs.

Motion denied and order vacated, without costs.

# VON HATTEN *v.* SCHOLL *et al.*

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, JANUARY, 1896.

## § 451.

*Designation of defendant whose Christian name is unknown—validity of judgment.*

Where one of the defendants in a foreclosure suit is named in the summons and other papers simply by his surname with a blank before it, and no description is added identifying the person intended, as permitted by § 451 of the Code of Civil Procedure, and no designation of the said defendant is made by a fictitious name so far as his Christian name is concerned, such defect does not render the judgment void if the defendant intended has been actually served.

The purchaser at the foreclosure sale, before taking the title, however, has a right to demand that the requisite amendment be made, so as to sufficiently designate the defendant intended.

(*Decided January*, 1896.)

Appeal by purchaser at a foreclosure sale from an order denying her motion to be relieved from said purchase.

*Lewis Hurst*, for appellant.

*Edwin C. Shaffer*, for respondent.

BARTLETT, J.—One of the defendants in the foreclosure suit was named in the summons and other papers simply as Kaul, with a blank before that name. The plaintiff did not add any description identifying the person intended, as permitted by § 451 of the Code of Civil Procedure, or designate this defendant by a fictitious name, so far as his Christian name was concerned. The

purchaser insists that these defects render the judgment void, and hence that she is entitled to be relieved from her purchase. We think the omissions did not invalidate the judgment, if the defendant intended was actually served. In that event, they were only irregularities, curable by amendment. Such is the clear weight of authority. Neil *v.* Martin, 24 *Hun*, 645; Grant *v.* Birdsall, 2 *Civ. Pro. R.* 422. Before taking the title, however, the purchaser has the right to demand that the requisite amendment be made. This cannot be done upon the affidavit of Karl Kaul, which was read in the Court below in opposition to her motion. In that affidavit the affiant states that he was duly personally served with the summons and a copy of the complaint in this action more than twenty days before the application for judgment; that his only interest in the premises involved herein was as a monthly tenant; that he has never appeared in the suit, has no defense, and waives any and all objection to the judgment. He does not say, however, and there is no proof that he is the defendant Kaul mentioned in the summons and complaint with a blank before his name. If the plaintiff shall supply proof of this fact, and procure the judgment to be amended accordingly, the appellant must complete the purchase.

The order appealed from should be reversed, unless the plaintiff procures an amendment of the foreclosure judgment so as to cure the irregularity growing out of the insufficient designation of the defendant Kaul. The purchaser should also have the costs of this appeal.

All concur.

# COGHLAN v. THIRD AVENUE RAILROAD.

SUPREME COURT, TRIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§§ 1902, 1904.

*Action to recover damages for death of infant—loss of service.*

In an action brought by a father, as administrator, under the statute (*Code of Civil Procedure*, §§ 1902, 1904), to recover damages for the death of his infant child, caused by defendant's negligence, the jury, in determining the amount of damages to be awarded, is, in duty bound to consider the probable earnings of the child during minority over and above her support, clothing and education.

A charge to the jury, as follows: "There can be no recovery in this case whatever for any loss of earnings which the child might have made while she was an infant, and until she had reached the age of twenty-one years. They are the subject of a recovery in a separate action on the part of the father of the child," is error for which a new trial will be granted.

(*Decided February*, 1896.)

Action by father of an infant, as administrator, to recover damages for the death of his child.

*Welch & Daniels*, for plaintiff.

*Hoadley, Lauterbach & Johnson*, for defendants.

GILDERSLEEVE, J.—The action is brought by the father, as administrator, under the statute (*Code*, §§ 1902, 1904) to recover damages for the death of his infant daughter, caused by defendant's negligence. The jury were charged as follows: "There can be no recovery in this case whatever for any loss of earnings which the child might have made while she was an infant, and until she

had reached the age of twenty-one years. They are the subject of a recovery in a separate action on the part of the father of the child." The jury brought in a verdict for six cents damages, in favor of plaintiff, who now makes his motion for a new trial. In the case of Watson, Adm'r, against the Brooklyn City Railroad Company (aff'd 103 *N. Y.* 687, without opinion), an action brought under the statute to recover damages for the death of an infant son, resulting from injuries received through the negligence of defendant, the General Term of the City Court of Brooklyn held that the entire damages could be recovered in that action. The General Term, however, expressed the opinion that there were two causes of action, one in favor of the father, and the other in favor of the administrator for the benefit of the next of kin. The pleadings in that action were identical with those in the case at bar, and I think the case is an authority in support of plaintiff's claim on this motion. The case of Keenan, Adm'r, against The Brooklyn City Railroad Company (145 *N. Y.* 348) also supports the plaintiff's position. The Court there say that "the jury, in determining the amount of damages that should be awarded, was in duty bound to consider the various elements of pecuniary loss sustained by the father, first the probable earnings of the son during his minority, over and above his support, clothing and education; next, the probability of his living and becoming of sufficient ability to support his father in the case of the latter becoming aged, poor and unable to support himself; and then the jury had a right to consider the amount the deceased would have brought to his next of kin, while living, and their prospect of inheriting from him after death." Where the deceased leave no widow or children, the father, as next of kin, would be entitled to the whole recovery in an action under the statute (*Code*, § 2732, subd. 7). Also in an action for loss of services during minority, he would be entitled to the whole recovery. Therefore, in

such case, where the father is the exclusive beneficiary, the entire pecuniary loss may be recovered in one action (McGovern v. R. R. Co., 67 *N. Y.*, 418). In the case at bar, it must be said that the recovery being exclusively for the benefit of the father, the loss of service during minority and any other pecuniary loss that could be established constitute substantially the same claim. And, in any event, it must be held that the plaintiff herein has elected to proceed for and recover his whole damage, including the loss of services of his child during minority, and that the recovery will be a bar to an action by the father as such, assuming that he has a cause of action independent of the statute (see McGovern v. R. R. Co., *supra*; Russner v. R. R. Co., 114 *N. Y.*, 433–438). The jury should have taken into consideration in estimating the pecuniary loss the probable earnings of the child during minority over and above her support, clothing and education. It was therefore error to charge the request above set forth, and for this reason the motion for a new trial should be granted. Under the circumstances, no costs are awarded.

---

## NIAGARA FALLS PAPER CO. *v.* STERLING.

CITY COURT OF NEW YORK, SPECIAL TERM, NOVEMBER, 1895.

§ 3169, subd. 3.

*Attachment—necessary allegations as to non-residence of defendants.*

In order to confer jurisdiction upon the Court to grant a warrant of attachment, it must affirmatively appear not only that the defendants are non-residents of the City of New York, but that they have not an office within that city where they regularly transact business, and where the plaintiff simply alleges that the

**defendants are non-residents of the City of New York, this is not a sufficient compliance with the jurisdictional requirements, and therefore invalidates the attachment.**

(*Decided November*, 1895.)

Motion to vacate attachment.

*Harold, Sturges & Rankine*, for plaintiff.

*Judge & Durack*, for defendant.

BOTTY, J.—The defendants having made an assignment of their property, for the benefit of creditors, to Joseph J. McDonald, which assignment was accepted by him, the title to the property vested in him as trustee of such creditors. This assignment holds good against the plaintiff as well as other creditors until the same is adjudged fraudulent and void upon a trial had in an action brought to set aside the assignment. The plaintiff, however, since the making of the assignment, obtained an attachment against the defendants on two grounds, viz.: First. That the defendants are non-residents of the City of New York. Second. That the defendants assigned, disposed of or secreted, or were about to assign, dispose of or secrete property with the intent to defraud their creditors. The proof relied on by plaintiff showing the assignment to be fraudulent consists of admissions made by the assignors subsequent to the making of the assignment to the effect that the alleged claim of one Plant, who was named as a preferred creditor, was fictitious. The defendant's assignee now moves to vacate the attachment upon the ground that the same is void for the reason that there is no evidence of fraud to support the attachment, and upon the further ground that the Court had not jurisdiction to grant the attachment by reason of the mere non-residence of the defendants. The plaintiff on the other hand contends that the attachment is supported by evidence of fraud, and that the Court had jurisdiction to grant same, but he urges as

preliminary objections that the assignee is a mere stranger to this proceeding, and that he has no right to intervene; that he has been guilty of laches in making this motion, and that the moving papers are defective in that the order to show cause does not specify the grounds of the irregularity complained of. I am of the opinion that the assignee is the proper party to make this motion, and that there has been no unnecessary delay in the making of the same, and that the objection to the sufficiency of the order to show cause is not tenable, as at least one of the objections to the attachment is radical and goes to the jurisdiction of the Court. It therefore remains to be determined whether, on the facts presented in support of the attachment, the Court acquired jurisdiction, and whether the alleged fraudulent assignment of defendant's property is established by competent evidence. In order to confer jurisdiction it must affirmatively appear not only that the defendants are non-residents of the City of New York, but that they have not an office within that city where they regularly transact business (see subd. 3, sec. 3169, Code of Civil Proc.). The plaintiff simply alleged that the defendants were non-residents of the City of New York, and that is one of the grounds mentioned in the attachment. This is not a sufficient compliance with the jurisdictional requirements, and therefore invalidates the attachment. The proof relied on by plaintiff to establish the fraudulent assignment of defendant's property, viz., the admissions made by the defendants since the making of the assignments; that the alleged claim of one plaintiff, a preferred creditor, is fictitious is not competent evidence, and therefore insufficient to support the attachment. It therefore follows that the attachment must be vacated.

Motion granted with $10 costs.

ELWOOD S. HAND, PLAINTIFF AND APPELLANT, v. CHARLES P. ROGERS, WILLIAM O. ROGERS, JR., GEORGE H. BURT AND SAMUEL FULTON, DEFENDANTS AND RESPONDENTS.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, FEBRUARY, 1896.

§ 1205.

*Suit against defendants as copartners—copartnership must be proved as alleged—one of the defendants not chargeable individually if the defendants joined as copartners were not such in fact.*

Section 1205 of the Code of Civil Procedure providing that "where the action is against two or more defendants, and a several judgment is proper, the Court may, in its discretion, render judgment or require the plaintiff to take judgment against one or more of the defendants, and direct that the action be severed, and proceed against the others as the only defendants therein;" does not apply in a case where the defendants were sued as copartners upon a contract made by one of their number, and upon the trial it was proved that said defendants were not copartners. In such a case a judgment individually against the defendant who made the contract is improper.

(*Decided February*, 1896.)

Appeal by plaintiff from an affirmance by the General Term of the City Court of the judgment entered upon the dismissal of the complaint.

*Charles DeHart Brower*, for appellant.

*John Henry Hull*, for respondents.

DALY, P. J.—The defendants were sued as copartners, composing the firm of Charles P. Rogers & Co., upon a

contract in writing made November 30th, 1889, by the defendant, Charles P. Rogers, in the said firm name. The complaint alleged that at that time the defendants were and still are said copartners. The answer denied all the allegations of the complaint except that defendants admit "that they are copartners under the name alleged."

Upon the trial it was proved that the defendant, Charles P. Rogers, personally executed the contract in the name of Charles P. Rogers & Co., but who were his copartners, if any there were at the time, was not shown. It was expressly admitted by plaintiff that the other defendants were not then his copartners, and thereupon defendants moved for a dismissal of the complaint. The plaintiff claimed that the complaint should be dismissed as to all but Charles P. Rogers. The motion to dismiss as to all the defendants was granted.

The position taken by the plaintiff at the trial was that an individual liability had been established against Charles P. Rogers, because it appeared that the other defendants were not his copartners when the contract was made. This is equivalent to saying that because certain persons were not his copartners he therefore had none; that a defendant can be sued as a copartner upon a contract purporting to be executed by a copartnership, and then charged individually because the persons the plaintiff happens to join as his copartners were not such in fact. Such a position is untenable; the copartnership must be proved as alleged, or the plaintiff must fail.

This is not the case of a person sued as sole defendant upon a contract purporting to be executed by a firm. In such a case the defendant must take the objection of nonjoinder of his copartners by demurrer or answer, otherwise the objection is waived, and judgment will be given against him individually (Douglas *v.* Leonard, 44 *St. R.* 293). But in order to recover against him individually, he must be sued individually. His objection to the non-

joinder of his copartners cannot be precluded, unless there is a non-joinder. If he is sued with the members of one firm upon a transaction of his as member of another firm, he is entitled to deny the making of the contract by the copartnership alleged, and to prevail in the action.

The plaintiff claims the benefit of section 1205 of the Code, which provides that "where the action is against two or more defendants, and a several judgment is proper, the Court may, in its discretion, render judgment or require the plaintiff to take judgment against one or more of the defendants, and direct that the action be severed, and proceed against the others as the only defendants therein."[1]

The section in question would apply if it appeared that when the defendant Charles P. Rogers made the contract in the firm name there was no firm and he had no partner, or that the contract was made for his own purposes and not in the business of the firm (Stedeker *v.* Bernard, 102 *N. Y.* 330). In such a case he would be individually liable, and judgment might be rendered against him, even if dismissed against the other defendants. But it did not appear that there was no firm of Charles P. Rogers & Co., of which defendant was a member at that time, or that the contract was his individual contract. The plaintiff proved nothing of the sort, and a several judgment would be improper.

The case is claimed by the plaintiff to be one of hardship, because, owing to repeated trials and appeals in the City Court, costs have accumulated far exceeding the original claim. But the answer of defendants apprised the plaintiff at the outset that issue was taken as to the

[1] The application of the provisions as to a separate judgment is not limited to cases of joint and several liability, but the section authorizes a separate judgment when a separate liability of some of the defendants is established on the trial, although the cause of action alleged in the complaint was joint only. Ferris *v.* Hard, 17 *State Rep.* 364; s. c., 15 *Civ. Proc. R.* 171.

copartnership of the defendants, and he could have saved further expense by discontinuance or amendment.

Judgment affirmed, with costs.

All concur.

---

## HENRY FEIST, APPELLANT, v. THE THIRD AVENUE RAILROAD CO., RESPONDENT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, JUNE, 1895.

§§ 724, 3347, subd. 6.

*District courts—origin and extent of power to open defaults.*

Section 724 of the Code of Civil Procedure, declaring the power of the Courts to open defaults within one year, applies only to Courts of record.

A Justice of a District Court of the City of New York has no power to open a default after the lapse of twenty days from the entry of judgment.

An order made in a District Court opening a default is not appealable to the General Term of the Court of Common Pleas.

Where judgment has been rendered by default in a District Court in favor of plaintiff, and, after the lapse of more than twenty days thereafter, the Justice assumed to open the default, and, upon the trial subsequently had, gave judgment for defendant dismissing the complaint, *Held*, upon appeal by plaintiff from the latter judgment, that the original judgment was unaffected by any subsequent proceedings, and the judgment appealed from must be reversed because of total lack of jurisdiction in the Justice to render it.

(*Decided June*, 1895.)

Appeal from a judgment of the District Court in the City of New York for the Ninth Judicial District, rendered

in favor of defendant for dismissal of the complaint, and also from a certain order opening a default.

*Charles Caldwell*, for appellant.

*Henry L. Scheuerman*, for respondent.

BISCHOFF, J.—Judgment in this action was rendered in plaintiff's favor upon default, and subsequently on defendant's motion an order was entered by the Justice opening the default and the cause was thereafter set down for trial.

Upon the day of the trial plaintiff appeared and moved that the order opening the default be set aside and that the original judgment stand, the motion being based upon the lack of jurisdiction of the Justice to make the order in question.

Upon the denial of this motion he refused to proceed with the trial, and judgment for dismissal of the complaint was rendered.

From that judgment and from the "decision and order" he has taken this appeal; the order referred to being that opening the default and the "decision" being the denial of the motion to vacate the order.

It is conceded that the Justice made the order opening the default after the lapse of twenty days from the date of entry of judgment, and there can be no question but that in so doing he exceeded his powers as defined and regulated by statute, beyond the provisions of which he was without authority to act (Hanlon *v.* Ins. Co., 9 *Misc. R.* 70).

The only statutory provision whereby a default in a District Court may be opened by the Justice is sec. 1367 of the Consolidation act (chapter 410, Laws of 1882), as amended by chapter 750, Laws of 1894. Prior to the original enactment of that section (Laws 1862, chap. 484, sec. 16) the Justices were wholly without jurisdiction over

a judgment after the date of its entry upon the docket (People v. Campbell, 18 *Abb. Pr.* 1).

The amendatory act beyond question limits the time in which the power may be exercised to twenty days after entry of judgment, while the section itself contained no restriction as to time. To us this is clear beyond need of argument; it is so declared in as many words, and this is not a case where any other construction, liberal or illiberal, is possible. But it is contended that sec. 724 of the Code, declaring the power of the Courts to open defaults within one year, affords justification for the order made below. That section, however, applies only to Courts of record (*Code C. P.*, sec. 3347, subd. 6), of which class the District Courts are not (*Code C. P.*, sec. 3, subd. 3).

Nor is it essential, as claimed, that the power to open defaults, irrespective of time, should be bestowed upon these Justices. If the defendant be not in fact served with the summons then an appeal may be entertained at any time for five years when instituted within twenty days after service of notice of entry (*Code C. P.*, secs. 3046, 3213); or if the service of the summons was defective the defendant may appeal from the judgment for error in fact (Jennings v. Miller, 10 *Misc. R.* 762; *Code C. P.*, secs. 3057, 3213). If the plaintiff is in fault, and by reason of his failure to notify defendant of the judgment by delaying issuance of execution, or in other ways, the twenty days' limit of time to appeal should have expired, a Court of equity can give the appropriate relief (Patterson v. Naehr, 16 *Civ. Pro. R.* 449), and if for the fault of the Justice, under some circumstances, the right to an appeal is lost, there is an adequate remedy at law (case last cited).

We are now to consider the effect of this erroneous order upon the merits of the case presented by this appeal.

From the order itself no appeal to this Court is warranted (Jacobs v. Zeltner, 9 *Misc. R.* 455; Wensley v. Ran-

dolph, *id.* 457; Rosenthal *v.* Grouse, 12 *Daly*, 532), our power to entertain appeals from the District Courts being derived from the statutes only, and in the absence of statutory provision we are unable to review orders made by such Courts other than final orders in summary proceedings. If hardship results it is due to the omission of the Legislature, when enlarging the powers of the Justices, to correspondingly provide for a review of their proceedings (see Rosenthal *v.* Grouse, *supra*).

But the appeal from the judgment in this case enables us to relieve the appellant, although the appeal from the order must necessarily be dismissed. That order having been granted and the original judgment set aside, through the Justice's act in excess of his powers, the act was without significance and the order void (Schwartz *v.* Wechler, 49 *N. Y. State R.* 145, and cases cited); hence the judgment as rendered was unaffected. The litigation in the Court below having been closed by the entry of the judgment in plaintiff's favor upon an inquest, and the lapse of twenty days, the Justice was without jurisdiction to re-open the proceedings and to give judgment for dismissal of the complaint upon plaintiff's refusal to proceed with the trial.

Some importance appears to be attached to the fact that upon the call of the calendar in the Court below plaintiff answered "ready" and only raised his objections when the case was reached for trial.

That a party cannot raise the objection of lack of jurisdiction over the subject of the litigation upon the trial, especially where the situation is such as was here the case, would seem to be a novel proposition. Such an objection is certainly not waived by a party's expressing his readiness to try the issues, among which this question is the chief.

Total lack of jurisdiction in the Court below is a fact of which the appellate Court may and should take notice,

even when the point was not raised at the trial (Brookman v. Hamil, 43 *N. Y.* 554; Palmer v. Lorillard, 16 *Johns.* 348; Sanford v. Granger, 12 *Barb.* 392). In this case, however, the question of jurisdiction was the only one presented to the Court below and upon which the matter was decided.

For the reasons noted the judgment is reversed, with costs, and the appeal from the order dismissed, with costs.

BOOKSTAVER, J., concurred.

---

## JACOB RINGLE AND GEORGE RINGLE, PLAINTIFFS, *v.* THE WALLIS IRON WORKS *et al.*, DEFENDANTS.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, FEBRUARY, 1896.

§§ 532, 814.

*Action on bond to discharge mechanic's lien—Assignment of bond to plaintiffs unnecessary.*

In an action brought upon a bond given to discharge a mechanic's lien, the lienor may sue as plaintiff in his own name, and no assignment of the bond to him is necessary to support the action.

The mere making and filing of a bond conditioned for the payment of any judgment which might be rendered against a piece of property against which a mechanic's lien has been filed does not of itself operate to discharge the lien. A special proceeding is still necessary in order to secure a determination as to the sufficiency of the sum, the approval of the Court or a Judge thereof, and then an order by the Court or a Judge thereof discharging the lien.

In an action on a bond where the plaintiff's right to prosecute is conditioned, upon the leave of the Court being first obtained, an allegation that such permission was "duly" obtained, and the

order granting it "duly made," imports a compliance with the statutory provision in respect to the proceedings which terminated in the order granting the leave asked.

(*Decided February*, 1896.)

Demurrer to complaint by defendant on the ground that it does not state facts sufficient to constitute a cause of action as against him.

*Thomas C. Ennever and E. L. Collier*, for plaintiffs.

*Wilson & Wallis*, for defendants.

BEEKMAN, J.—On the 16th day of February, 1892, the plaintiffs filed a lien, under the Mechanics' Lien law, against certain premises situated in the City of New York, owned by the Terminal Warehouse Company, for the sum of $11,161, for labor and materials furnished in the erection of a certain structure on said premises. The contract under which the liability arose was made by the Wallis Iron Works, as principal contractor, with the Terminal Warehouse Company for the erection of the building. The defendant, the Wallis Iron Works, being desirous of discharging the lien, executed a bond in which Benjamin C. Clark and the defendant, Francis O. Matthiessen, joined as sureties to William J. McKenna, Clerk of the City and County of New York, in the sum of $13,000, conditioned for the payment of any judgment which might be rendered against the property, pursuant to the provisions of subdivision 6 of section 24 of chapter 342 of the Laws of 1885 as amended, commonly known as the Mechanics' Lien law. Thereupon the lien was discharged of record.

Thereafter an action was brought by the plaintiffs against the Wallis Iron Works, and the Terminal Warehouse Company as sole defendants, for the purpose of foreclosing the lien, as provided by law. Issue was joined in that action, and after a trial had at Special Term a decision was rendered upon which a judgment was entered in favor

of plaintiffs and against the defendant The Wallis Iron Works for the sum of $12,500.32 and for the sum of $445.25 costs, amounting in all to the sum of $12,945.57. It was also adjudged that the lien which had been filed by the plaintiffs was a good and valid lien for the full amount specified therein with interest, and judgment was directed against the premises for the above amount of $12,945.57. By reason, however, of the previous discharge of the lien by the giving of the bond above mentioned, this provision was inserted in the judgment: "It is further ordered, adjudged and decreed, however, that so much of this judgment as is against the said premises and as declares that the said plaintiffs now have a lien and claim against said premises is in form only, and has been directed and is now entered for the purpose of enabling the said plaintiffs to recover upon a certain bond given by the Wallis Iron Works as principal and Benjamin G. Clarke and Francis O. Matthiessen as sureties, and which was filed in the office of the Clerk of the City and County of New York, on the 1st day of April, 1892, for the purpose of discharging the said mechanics' lien or claim as against the said real estate, as provided by a certain order of the Supreme Court of the State of New York, bearing date of the 1st of April, 1892."

Thereafter the Wallis Iron Works appealed to the General Term of this Court from said judgment, with the result that the same was affirmed.

On the 12th day of August, 1892, the defendant Benjamin G. Clarke, one of the sureties on the bond, died, leaving a will, which was duly proved, and the defendants, Ada C. Hardenburgh, Anne M. Clarke and Julia M. Ellsworth were thereupon duly appointed executrices of said will.

The plaintiffs now sue the obligors under said bond for the amount of the recovery in the action instituted to foreclose the lien. The defendant Francis O. Matthiessen,

one of the sureties under the bond, demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action as against him. The particular grounds of the demurrer are set forth in the brief which has been submitted by the counsel for the demurrant, and are highly technical in their character. They will be considered in the order in which they have been stated.

I. It is claimed that the complaint does not allege any assignment of the bond by the County Clerk to the plaintiffs, and therefore fails to allege any cause of action, unless some provision of law can be found in their favor.

Section 814 of the Code of Civil Procedure provides that "where a bond or undertaking has been given, as prescribed by law, in the course of an action or special proceeding, to the people or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof, the party or other person, so interested, may maintain an action in his own name for a breach of the condition of the bond, or of the terms of the undertaking, upon procuring an order granting him leave so to do." It is further provided that "the order may be made by the Court in which the action is or was pending, the Court of the City of New York or a County Court, if the bond or undertaking was given in a special proceeding pending before a Judge of that Court; or, in any other case, by the Supreme Court. Notice of the application therefor must be given, as directed by the Court or Judge, to the persons interested in the disposition of the proceeds."

The bond in question is one which comes within the purview of this section. Subdivision 6 of section 24 of the Mechanics' Lien Law (*supra*) provides that such a lien may be discharged by the filing of a bond as above stated, "in such sum as the Court may direct, not less than the amount of the claim in said notice, conditioned

for the payment of any judgment which may be rendered against the property." It further provides that the sureties on said bond must justify in at least double the sum named therein; that a copy of the bond, with a notice that the sureties will justify before the Court or a Judge thereof at the time and place named therein, not less than five days thereafter, must be served on the claimant or his attorney, and that upon the approval of said bond by the Court or a Judge thereof, an order discharging such lien may be made by the Court or a Judge thereof. It will therefore be seen that the mere making and filing of the bond does not of itself operate to discharge the lien. A special proceeding is still necessary in order to secure a determination as to the sufficiency of the sum, the approval of the Court or a Judge thereof, and then an order by the Court or a Judge thereof discharging the lien. The bond, therefore, is one given in the course of a special proceeding within the spirit and intent of that section. The complaint alleges that "before the commencement of this action an order was duly made permitting these plaintiffs to commence an action in their own name to enforce the said bond." While the statement is exceedingly meager, I do not think that it is bad on demurrer. The bond was given for the benefit of the plaintiffs; they are the real parties in interest, but their right to prosecute the same is conditioned upon the leave of the Court being first obtained. I think, under these circumstances, the assertion that such permission was duly obtained imports a compliance with the statutory provision in respect to the proceedings which terminated in the order granting the leave asked (§ 532, *Code of Civil Procedure*).

II. It is objected that the complaint does not allege that the Court at any time fixed the amount of the bond which was given in discharge of the lien.

Upon this point the complaint contains the following allegations:

"Fourth. That thereafter the said The Wallis Iron Works instituted or caused to be instituted certain proceedings in the Supreme Court of the State of New York for the purpose of securing the discharge of the real property mentioned in said notice, from the lien of the said mechanic's lien or claim, pursuant to the statute in such case made and provided.

"Fifth. That thereafter the amount of the bond to be given for the purpose of discharging said lien was duly fixed at the sum of thirteen thousand dollars."

After setting out the execution and filing of the bond in question pursuant to said order, it is alleged that on the first day of April, 1892, an order was duly made by this Court approving the bond, and directing that upon the filing of the same the said lien should be cancelled and discharged of record; and that thereafter the said bond was filed and the lien discharged, as required by the order.

The assertion that the amount of the bond was duly fixed, taken in connection with the other allegations in respect to the entire proceeding, is sufficient within the existing rules of pleading.

III. The objection that the complaint should allege that the bond was given "in an action or special proceeding" is untenable. As we have seen, the complaint does set forth a proceeding for the cancellation and discharge of a lien, in which proceeding the bond in question was given. The complaint very clearly alleges that the bond was given in the course of the proceeding above referred to. The effort to show that it does not is extremely forced and unnatural and unworthy of serious consideration.

IV. The objection that the complaint is insufficient because it fails to show that notice of the application for leave to prosecute the bond had been given, as provided in section 814 of the Code, is also untenable. The allegation contained in the 14th paragraph of the complaint,

that the order was "duly made," sufficiently meets this criticism.

These are all of the objections which have been made to the complaint. In addition to what has been already stated, it may be further said that the defendant, as a party to the bond, cannot question the regularity of the proceedings under which, through his intervention, the lien referred to has been discharged. The only objection, therefore, upon which he is entitled to be heard is that which relates to the proceeding giving the plaintiffs permission to sue; and in respect to this, as we have seen, the complaint is sufficient.

The demurrer is therefore overruled, with costs, with leave to the defendant to answer within twenty days after service upon him of a copy of the interlocutory judgment, upon payment of costs.

---

## GARRETT TOOLE *et al* v. THE BOARD OF SUPERVISORS OF ONEIDA COUNTY.

SUPREME COURT, SPECIAL TERM, ONEIDA COUNTY, NOVEMBER, 1895.

§ 1393.

*Property purchased with pension moneys—exempt from seizure for non-payment of taxes.*

Where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt from seizure for non-payment of taxes, under section 1393 of the Code.

Where pension moneys can be clearly identified and are used in the purchase of necessary articles, or are loaned or invested for the

purpose of increase or safety, in such form as to secure their available use for the benefit of the pensioner in time of need they come within the meaning of the statute exempting such moneys from seizure and sale for non-payment of taxes, but where they have been embarked in trade, commerce, or speculation, and become mingled with other funds, so as to be incapable of identification or separation, the pensioner loses the benefit of the statutory exemption.

*Held*, that section 1393 of the Code of Civil Procedure, as construed by the Court of Appeals with reference to exemption of property purchased with pension moneys from sale under execution, applies with equal force to exemption for non-payment of taxes.

(*Decided November*, 1895.)

Action by the plaintiffs to cancel an assessment of taxes upon property owned by them in the City of Utica, and to set aside a tax sale thereunder, as a cloud upon their title.

The plaintiff, Garrett Toole, while serving as a soldier of the United States in the war of the rebellion contracted a disease which so far disabled him that in 1865 he was allowed a pension, to commence from the 20th of November, 1862. Upon the allowance of his pension, the first payment received amounted to nine hundred dollars ($900), which he at once invested in the house and lot in question. The purchase price was eleven hundred dollars, and the balance of two hundred dollars, with interest, he paid out of other pension moneys as they were received from the government, so that the entire purchase price was paid with pension moneys.

On the 23d of May, 1893, he conveyed the premises to an intermediary, who forthwith conveyed the same back to Mr. Toole and his wife. In 1893 the entire premises were assessed in the name of Garrett Toole, upon a valuation of four hundred dollars, and subsequently, by proceedings usual in such cases, the property was sold to the defendant for the non-payment of the tax so assessed.

The premises consist of a house and lot that are occupied by Mr. Toole and his wife and child. There are no buildings upon the property except a small dwelling-house and

hen-house, which was there when Mr. Toole purchased the property. It does not appear that any improvements have since been made, or that the property has increased in value since the date of the purchase.

*George C. Carter*, for plaintiff.

*George C. Morehouse*, for defendant.

VANN, J.—Both the National and State Legislatures have been careful to protect soldiers in the enjoyment not only of their pension money, but also of such property bought with pension money as can be clearly and definitely traced to that source. The Federal statute upon the subject is as follows: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." (*U. S. R. S.*, sec. 4, 747.) The statute of this State applicable to the subject is part of the Code of Civil Procedure, occurring under the title of "Property exempt from levy and sale," and is as follows: "The pay and bounty of a non-commissioned officer, musician, or private, in the military or naval service of the United States; a land warrant, pension, or other reward, heretofore or hereafter granted by the United States or by a State for military or naval service; a sword, horse, medal, emblem, or device of any kind, presented as a testimonial for service rendered in the military or naval service of the United States; and the uniform, arms, and equipments which were used by a person in that service, are also exempt from levy and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding." (*Code Civ. Proc.*, sec. 1393.)

This section received careful consideration in Yates County National Bank *v.* Carpenter (119 *N. Y.* 550), where it was held by the Court of Appeals, all the judges concurring, that when the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt from levy and sale on execution. In discussing the case, Chief Judge Ruger used the following language: "The plain purpose of the act was to promote the comfort of the soldier, to secure to him the bounty of the Government, free from the claim of creditors, and to insure him and his family a safe though a modest maintenance so long as their needs require it. * * * We entertain no doubt that where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of this statute." *

Where such moneys can be clearly identified and are

* Property purchased by the widow of a soldier with pension money received by her from the Government is exempt. People *ex rel. v.* Williams, 27 *N. Y. Supp.* 23; s. c., 6 *Misc. R.* 185.

See also Countryman *v.* Countryman, 23 *Civ. Proc. R.* 161; s.c., 28 *N. Y. Supp.* 258.

If the pension is given by the pensioner to his wife, property purchased by her with it is exempt. Whiting *v.* Barnett, 7 *Lans.* 106.

Where a pensioner who had a wife and family purchased a house and lot for a home, paying a portion of the purchase price out of the proceeds of a pension certificate and giving a mortgage on the premises, to secure the balance. *Held*, that the premises were exempt from levy and sale on execution. Yates Co. Nat. Bk. *v.* Carpenter, 119 *N. Y.* 550.

See also Burgett *v.* Fancher, 35 *Hun*, 647.

*Exemption not perpetual.*—Pension moneys given to a woman for the military services of her son are not exempt after her death. Matter of Winans, 5 *Dem.* 188.

The exemption has no application after the pensioner's death. Beecher *v.* Barker, 6 *Dem.* 129; 20 *State Rep.* 136.

See also Matter of Kennedy, 18 *State Rep.* 993; 3 *N. Y. Supp.* 18.

used in the purchase of necessary articles, or are loaned or invested for the purpose of increase or safety, in such form as to secure their available use for the benefit of the pensioner in time of need, we do not doubt but that they come within the meaning of the statute, but where they have been embarked in trade, commerce or speculation, and become mingled with other funds, so as to be incapable of identification or separation, we do not doubt but that the pensioner loses the benefit of the statutory exemption.

As it appears that the pensioner in question has no property aside from his interest in this real estate and the monthly pension allowed him by the Government, this case and the language in deciding it seems applicable to the case in hand. The statute of exemptions makes no distinction between a levy and sale by virtue of an execution, which was that case, and the non-payment of taxes, which is this case. Considering the object of the statute, no reason is apparent for a distinction, as the soldier might lose his home, which it was the object of the statute to secure to him, by a sale for the non-payment of taxes the same as by a sale for the non-payment of debts. The Legislature, grateful to the soldiers who so faithfully served the country in its time of need, clearly intended to provide a comfortable support to such as had been wounded or had become disabled by disease in the discharge of their duties, by allowing them the use of all pension moneys, free from any claim for debt or taxes. A statute with such an object should be so construed as to carry that object into effect, and without further discussion it is, therefore, held that the section under consideration, as construed by the Court of Appeals with reference to exemption from sale under execution, applies with equal force to exemption for non-payment of taxes.

The defendant, however, claims that the wife has an interest in the property in question, as tenant by the entirety, by virtue of deed running to the plaintiffs jointly,

and the authorities sustain this position. Bertles v. Noonan, 92 *N. Y.* 152; Zornlein v. Bram, 100 *N. Y.* 12; Hiles v. Fisher, 144 *N. Y.* 306. From this fact it is argued that the wife had an assessable interest in said land, which is properly correct. It is further argued that as real property may be assessed either to the owner or occupant, this property was properly assessed in the name of the husband, and that the assessment in question, if it is held that his interest was not assessable, should be regarded as applicable to her interest only. An assessment upon her interest only, however, should in some way describe and identify it as her exclusive interest, as otherwise it would mislead purchasers and place a cloud upon the title of the husband. This was not done in the assessment in question, which is upon "all that piece or parcel of land," etc., and not upon any specific interest in it. The advertisement of sale was in the same form, and the sale was apparently of the entire land and all estate, title and interest therein. In form at least it included the interest of the husband only, for the name of the wife does not appear nor is there any suggestion that any interest except that of the husband was assessed or offered for sale.

The defendant further claims that property bought with pension moneys does not continue to be exempt, even if occupied by the pensioner and his family, provided it so increases in value as to be far beyond the needs of his family for "a safe but modest maintenance." It may be that this position is correct, and that in a case where the property has largely increased in value only a certain amount of the valuation would be exempt and the remainder taxable. But the argument based upon this proposition, that as the assessors had jurisdiction, it is to be presumed that their valuation of four hundred dollars was only for the excess properly assessable, owing to increase in value, I do not regard as sound, under the circumstances

of this case. Without reference to the question as to which party the burden of proof rested upon, I think the evidence fairly warrants the inference that there has been no substantial increase in value since the date of purchase, which was May 13th, 1885. The consideration then paid was eleven hundred dollars, and no substantial improvements have been since made. It is still occupied as a dwelling-house, and not for business purposes. The fact that there is a hen-house upon the premises, consisting of a house and lot in a city, is not without significance upon the point under consideration. No other point worthy of the expression of consideration has been made. No question was raised in the answer or made upon the trial as to misjoinder of parties plaintiff.

Upon the whole case I think the plaintiffs entitled to judgment canceling the assessment and vacating the sale, with costs.

Findings and decree may be prepared accordingly, and if not assented to as to form, settled before me upon a notice of two days.

---

## HERMAN FROMME AND ABRAHAM L. FROMME, APPELLANTS, v. WILLIAM E. GREY, RESPONDENT.

COURT OF APPEALS, MARCH, 1896.

§ 14.

*Interposition of false answer not a contempt of Court.*

The knowingly interposing a false answer is not a contempt of Court for which a party may be punished in a civil proceeding.

An answer is not "a mandate or proceeding of the Court" within the meaning of section 14, subd. 2, of the Code of Civil Procedure.

(*Decided March*, 1896.

Appeal from an order of the General Term of the Court of Common Pleas for the City and County of New York, reversing an order of the General Term of the City Court affirming an order of the Special Term.

In this action, which was brought to recover for the services rendered to the defendant by the plaintiffs as his attorneys, the defendant interposed an answer, putting in issue the material allegations of the complaint, and the action was tried upon the issues formed by the pleadings. Judgment was rendered in favor of the plaintiffs upon the verdict of a jury, and an execution issued upon the judgment was returned only partially satisfied. Supplementary proceedings for the examination of the judgment debtor were had and a receiver of his property was appointed. Having failed to realize anything through the receiver, the plaintiffs made a motion to punish the defendant for contempt of Court for making a false answer and verification in the action. That motion was granted and an order was entered adjudging the defendant guilty of contempt for having interposed a false verified answer for the purpose of delaying the plaintiffs, by which misconduct their rights had been impaired and prejudiced. A fine was imposed equal to the amount remaining due upon the judgment. The General Term of the City Court of New York, in which the action and proceedings were had, affirmed the order, but, upon appeal to the General Term of the Court of Common Pleas for the City and County of New York, the order of the City Court was reversed and the defendant discharged from custody.

*Jacob Fromme*, for appellant.

*William B. Hornblower*, for respondent.

PER CURIAM.—We are not impressed with the force of the argument which is made in support of the order of

the City Court, and we deem it only necessary to state briefly our reasons for affirming the action of the Common Pleas Court. The proposition involved is somewhat startling and can have no support in the provisions of the Code of Civil Procedure, unless found in the very strained construction which has been placed upon subdivision 2 of section 14, which treats of civil contempts. The subdivision mentions as one of the cases, "a party to the action or special proceeding * * * for any deceit or abuse of a mandate or proceeding of the Court." Unless it is found in that provision, authority does not exist elsewhere in the Code. An answer, however, is not "a proceeding of the court," and, of course, it is not a "mandate." A pleading may be a proceeding of the party in Court; but it is in no sense a proceeding of the Court, to which alone the section has reference. Nor does the use of the word "deceit" affect the question; inasmuch as it must be a deceit of the Court, or practiced upon the Court, which is punishable, and it is absurd to say that a false answer, in any sense, deceives the Court. The Court is not misled by it; nor regards it otherwise than as a defense which raises an issue to be tried by it. If we assume that the defendent perjured himself in interposing the verified answer in question, then his punishment must be left to the criminal branch of the Court: where, after proper proceedings, he may be tried by a jury for the offense as charged in an indictment. The Special Term decisions, to which we have been referred, we deem to have been made without a proper or careful consideration of the matter.

The opinion delivered at the General Term satisfactorily discusses the question, and we think its order was correct and should be affirmed, with costs.

All concur.

# RICHARD DEEVES v. THE METROPOLITAN REALTY CO., OF THE CITY OF NEW YORK.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, DECEMBER, 1894.

§§ 478–546.

*Pleadings—to be considered together.*

A plaintiff's pleadings are to be taken together, and if together they state facts sufficient to constitute a cause of action, the suit may be maintained, although the complaint alone may not be sufficient.

In an action brought to foreclose a mechanic's lien, the complaint alleges due performance of all the conditions of the contract; the defendant answers that the work was not performed within the time limited in the contract, interposing affirmative defenses and counterclaims; whereupon plaintiff serves a reply alleging that by the neglect, delay and default of defendant, the completion of said contract within the time limited was rendered impracticable and impossible; and that defendant waived its right to insist upon the completion of said work within such time.

*Held*, that the complaint and reply are to be taken together, and that together they present a state of facts upon which the plaintiff is entitled to recover.

(*Decided December*, 1894.)

Action to foreclose a mechanic's lien.

*Abner C. Thomas and David Thornton*, for plaintiff.

*Charles J. Hardy*, for defendant.

WILBUR LARREMORE, Referee. — This action was brought for the foreclosure of a mechanic's lien. The plaintiff sues as contractor for the performance of the

mason work of the Metropolitan Realty Building, a fourteen story structure situated on William and Rose streets adjoining the north side of the Brooklyn Bridge, in the City of New York. It was agreed between the parties that such work should be performed for the sum of $184,985.00. Plaintiff's original contract was substantially performed, though not within the time limited for such performance.

The first point made by the learned counsel for the defendant involves a question of pleadings. The complaint alleges that plaintiff "duly performed all the conditions" of the contract, and "did and performed all the work and furnished all the materials," "and the work which plaintiff was to do was finished and fully completed in accordance with the said agreement." Defendant argues that, as it does not appear that the work was finished within the time fixed in the contract, but as, on the contrary, it expressly appears that such work was not completed until several months thereafter, the plaintiff cannot recover under general allegations of due performance of said contract. In Morowsky *v.* Rohrig, 4 *Misc.* 167, it was decided by the General Term of this Court that, under a simple allegation in the complaint of full performance of a written contract in an action to foreclose a mechanic's lien, evidence in support of plaintiff's excuse for non-performance according to the literal terms of the contract, and of substantial performance within a certain period after the term fixed by the contract, is inadmissible. To the same effect is Elting *v.* Dayton, 43 *St. Rep.* 363, also an action to foreclose a mechanic's lien. In that case, as counsel for the defense points out, the contract provided for completion within a specified time, and it there, as here, appeared that the work was not done within that time, and judgment for plaintiff was reversed because under the pleadings the only issue tendered was complete performance,—in time as well as in character and amount of work.

The present case is, however, distinguishable from both of the cases cited, because, while the complaint contains only allegations of complete and due performance, the answer expressly alleges that the work was not actually performed until a considerable period after the expiration of the contract time, interposing affirmative defences and counterclaims; and plaintiff served a reply which, in my judgment, obviates the defect of pleading on which the learned counsel for the defense relies. A case in point is Raplee *v.* Wilkin (January, 1888), 5 *N. Y. Week. Dig.* 560. It was therein held that a plaintiff's pleadings are to be taken together, and that if together they state facts sufficient to constitute a cause of action, the suit may be maintained, although the complaint alone may not be sufficient. The Court said: "Although the complaint might not be sufficient alone and the reply is irregular, yet the irregularity having been waived by the defendant in accepting it and not moving to strike it out, the pleadings are to be taken together. And together they presented a state of facts upon which the plaintiff was entitled to recover."

I shall overrule the general objection to plaintiff's recovery in this action on the authority of the case last cited. And it would seem that the doctrine therein advanced of construing the pleadings as a whole is in the plain interest of substantial justice. The rule seems to be that the proofs received upon the trial of an action are to be taken as a whole in considering an appeal from the denial of a defendant's motion for a non-suit. In Colegrove *v.* R. R. Co., 20 *N. Y.* 492; 6 *Duer*, 362, it was held that if a defendant moves for a non-suit to which he is entitled, but on its denial puts in evidence, and plaintiff's case is established, ths defendant's exception is waived. The principle of that case seems to be that the proofs are to be considered as a whole in testing the general adequacy thereof, although part of the evidence comes from the defendant. *A fortiori* it would seem that if a plaintiff, in

separate pleadings but still in pleadings emanating solely from himself, alleges a cause of action, the same must be held to be sufficiently pleaded for all purposes.

Upon an inspection of the pleadings in the present action it would seem almost as if the reply had been expressly framed to anticipate the objection now raised. It contains allegations in the first place directly addressed to the counterclaims and set-offs raised in the answer. It then, "for further reply," alleges delay, neglect and omission on defendant's part to perform and complete certain work in respect to the building referred to in the complaint and answer, which it was its duty to perform, and which were necessary to be done before the work of the plaintiff could be completed; that defendant ordered alterations and changes of the work and materials from time to time; that plaintiff was obstructed and delayed in the prosecution and completion of the work by the neglect, delay and default of the defendant and its other contractors, whereby the completion of the work called for by the contract within the time thereby limited was rendered impracticable and impossible to or by the plaintiff; and that the defendant waived its right to insist upon the completion of said work within the time so limited. Upon the authority of Raplee v. Wilkin (*supra*), the doctrine of which meets with my approval, I shall hold the rule that the pleadings are sufficient to support a recovery by plaintiff.

(Remarks on other questions omitted.)

# SABIN v. KENDRICK.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, FEBRUARY, 1896.

§§ 435–445, 638.

*Order for publication of summons—service without the State—attachment—time within which summons must be served.*

An order which provides for the service of summons and complaint by publication by mailing the papers "directed to the defendant" without specifying any place to which they were to be addressed, and also contains a provision authorizing personal service of the summons and complaint upon the defendant without the State, is defective as an order of publication, but valid as an order permitting personal service without the State; and its validity as such is not affected by its insufficiency as an order of publication.

Under section 638 of the Code of Civil Procedure, providing that personal service of the summons must be made upon the defendant against whose property an attachment has been granted within 30 days after the granting thereof or else before the expiration of the same time, service of the summons by publication must be commenced or service thereof must be made without the State, pursuant to an order obtained therefor; failure to serve the summons without the State upon a non-resident till after the expiration of the 30 days does not affect the validity of the service, or the order authorizing it, but simply the validity of the attachment, which the defendant thereupon is entitled to have vacated.

(*Decided February*, 1896.)

Appeal by defendant from an order of the Special Term, Kings County, denying a motion to vacate order of publication and set aside the service of the summons.

*J. M. Ferguson*, for plaintiff, respondent.

*William H. Sage*, for defendant, appellant.

BARTLETT, J.—The learned counsel for the appellant

concedes that an order of publication need not contain both the requirement that the summons shall be published, and the provision that service may be made without the State, at the option of the plaintiff. *In re* Field, 132 *N. Y.* 184; 30 *N. E.* 48. He insists, however, that when the plaintiff makes no election between the two modes of service, but inserts both provisions in the order, the omission to specify a place to which copies of the summons, complaint, and order shall be directed, addressed to the defendant, is a jurisdictional defect which is fatal to the order. It does not seem to us that this view is correct. No doubt, the order of publication in the present case was defective, in that it merely provided for the mailing of the papers "directed to the defendant," without specifying any place to which they were to be addressed. But, inasmuch as everything relating to the publication and mailing might have been omitted without affecting the validity of that part of the order which authorized the personal service of the summons without the State, we do not see how the omission of one thing relating to such publication and mailing can invalidate it. The order remained perfect as an order permitting the plaintiff to have the summons served upon the defendant personally outside the limits of New York, and the summons was so served, in the State of Connecticut, on the 25th day of October, 1895.

The order of publication was made more than 30 days before that date, and a warrant of attachment had also been granted against the property of the defendant more than 30 days before. Section 638 of the Code of Civil Procedure, which is contained in the title relating to the provisional remedy of attachment, prescribes that personal service of the summons must be made upon the defendant against whose property the attachment is granted within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by

publication must be commenced, or service thereof must be made, without the State, pursuant to an order obtained thereof. There was no attempt to publish the summons in the case at bar, but it was served in Connecticut, pursuant to the order, as already stated. We do not think that the lapse of more than 30 days had any effect upon the service of the summons without the State, or upon the order authorizing such service. The effect of the delay was limited to the attachment, which the defendant thereupon became entitled to have vacated. The service of the summons without the State would have been perfectly good, although there had been no attachment whatever. The Code, in the provisions relating to attachment, nowhere declares that the action shall abate, or the court be ousted of jurisdiction, by reason of a delay of more than 30 days in the personal service of the summons, or the beginning of the publication thereof; and, in the absence of such a provision in express terms, we can perceive no good reason for extending the effect of the omission beyond the avoidance of the attachment.

The order appealed from must be affirmed with costs.

All concur.

## CORN v. TAMSEN, SHERIFF.

SUPREME COURT, SPECIAL TERM, NEW YORK CITY, JANUARY, 1896.

§§ 1421, 1424.

*Substitution of indemnitors on bond as defendants in place of Sheriff.*

Under section 1421 of the Code of Civil Procedure, as amended in 1887, when an action to recover a chattel levied upon by the Sheriff by virtue of an execution or warrant of attachment, is brought against said Sheriff, and a bond indemnifying him against the levy has been given in behalf of the judgment creditor or the plaintiff in the warrant, the Court has power to grant an order substituting the indemnitors on the bond as defendants in place of the Sheriff even in cases where successive levies have been made. Where, however, the levies subsequent to the first were only upon the proceeds of the property seized in excess of the judgment for which the first levy was made, there can be no substitution of any of the indemnitors except those on the first levy.

Under section 1424 of the Code, if the indemnity given relates to a part only of the property, the Court may in a proper case direct that the action be divided into two actions; that the indemnitors be substituted as defendants in one, without affecting the other, and that the controversy in each action be limited to that part of the property in respect to which it is to be continued.

(*Decided January*, 1896.)

Motion by the defendant to have the indemnitors on certain bonds given to the Sheriff upon a levy upon property substituted as defendants in the place of the Sheriff.

*Charles F. MacLean*, for defendant and motion.

*Henry Gottgetreu*, for plaintiff, opposed.

*Samuel Fleischman*, for indemnitors, opposed.

TRUAX, J.—This is a motion made by the defendant to have the indemnitors on certain bonds given to the Sheriff upon a levy upon property substituted as defendants in the place of the Sheriff. The motion is opposed by the plaintiff and the indemnitors, and they refer me to the case of Hayes *v.* Davidson (98 *N. Y.* page 19) as an authority for the contention that the indemnitors should not be substituted. Section 1421 of the Code was amended after the decision of the Court of Appeals in Hayes against Davidson so as to meet the suggestion made by the Court in that case. That section of the Code read as follows at the time of the decision of Hayes against Davidson: "1421. Where an action to recover a chattel, hereafter levied upon by virtue of an execution, or a warrant of attachment, or to recover damages by reason of a levy upon, detention or sale of personal property, hereafter made, by virtue of an execution, or a warrant of attachment, is brought against an officer, or against a person who acted by his command, or in his aid, if a bond or written undertaking, indemnifying the officer against the levy or other act, was given, in behalf of the judgment creditor, or the plaintiff in the warrant, before the action was commenced, the person or persons who gave it, or the survivors, if one or more are dead, may apply to the Court for an order to substitute the applicants, as defendants in the action, in place of the officer, or of the person so acting by his command, or in his aid." It now reads as follows, and I have noted the difference between the two sections in italics: "1421. (Am'd, 1887.) Where an action to recover a chattel, *or chattels*, hereafter levied upon by virtue of an execution *or several executions*, or a warrant of attachment, *or several warrants of attachment*, or to recover damages by reason of a levy *or levies*, upon detention, sale *or sales* of personal property hereafter made, by virtue of an execution *or several executions*, or a warrant of attachment *or several warrants of attachment* is brought against an officer or against

a person who acted by his command or in his aid, if a bond *or bonds* or written undertaking *or undertakings* indemnifying the officer against the levy *or levies*, or other act *or acts*, has been given in behalf of the judgment creditor *or the several judgment creditors*, or the plaintiff in the warrant *or the plaintiffs in the several warrants*, either before *or after* the commencement of the action, the persons or person *or the several persons* who gave it to them, or the survivors, if one or more are dead, may apply to the Court for an order to substitute the applicant *or several applicants* as defendants in the action in place of the officer or of the person so acting by his command or in his aid; *and the Court shall, upon application of the officer, or in case of his death, upon the application of his legal representatives, grant an order substituting the indemnitors as defendants in the action in place of the officer or of the persons so acting by his command or in his aid.*" This amendment allows the Court to make an order of substitution in cases where successive levies have been made. Under section 1424, if the indemnity given relates to a part only of the property, the Court may in a proper case direct that the action be divided into two actions; that the indemnitors be substituted as defendants in one, without affecting the other, and that the controversy in each action be limited to that part of the property in respect of which it is to be continued. As near as I can make out from the papers, the first levy was made under the Claflin Co. executions; and the other levies were not in fact made on the property, but were, rather, levies on the proceeds of the property in excess of the Claflin judgments, if there were any such proceeds. I think, under the decision of Carter *v.* Bowe (47 *Hun*, 628), that this motion should not be granted against any of the indemnitors except the indemnitors given on behalf of the Claflin executions. The General Term of this Department held, in the case last above cited, that no substitution can be made where

there have been several successive seizures, and there are no facts which indicate with reasonable certainty the property seized under the process for which the petitioner became a party to the bond of indemnity. It is true that the application in that case was made by the indemnitor; but I cannot see that that fact makes any difference in law. If the motion were granted in this case, each of the defendant indemnitors would be liable for the whole amount of the judgment, if any should be recovered against them; whereas, they did not indemnify for the taking of all of the property the taking of which constitutes the plaintiff's cause of action. Motion is granted as to the indemnitors on the Claflin executions, with $50 costs to the Sheriff's attorney, and denied as to the others, without costs. Let an order be entered on notice.

---

## SARAH LYNCH *v.* GEORGE W. SAUER.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, MARCH, 1896.

§ 1344.

*Practice—on allowing appeals from Appellate Term to Appellate Division.*

The practice in regard to granting leave to appeal to the Appellate Division from judgments and orders of the Appellate Term must be assimilated to that formerly prevailing in the Court of Common Pleas on like motions for leave to appeal to the Court of Appeals in actions commenced in the City and District Courts.

By such practice leave would be granted only (1) where the determination involved great interests or settled a principle of law affecting the decision of numerous other cases; (2) where the decision of the Court was in direct conflict with one rendered by a General Term of the same district.

The provision of section 1344 of the Code of Civil Procedure allowing appeals from the Appellate Term to the Appellate Division, like that previously contained in section 191 permitting appeals to the Court of Appeals, is permissive only, bears the same interpretation and requires like regulation.

Leave will not be granted where the subject-matter involved is trifling in amount, and the delay would work a hardship on the respondent, nor where the principle involved is not of sufficient importance to justify the application. A novel question of evidence does not present such a case.

(*Decided March*, 1896.)

Motion by defendant-appellant for leave to appeal to the Appellate Division under Rule VII. of the Appellate Division regulating the hearing of appeals from the City and District Courts.

*B. Metzger* and *G. M. Curtis*, for motion.

*Anderson, Howland & Murray*, opposed.

By the Court.—The practice in regard to granting leave to appeal to the Appellate Division from judgments and orders of this term must be assimilated to that formerly prevailing in the Court of Common Pleas on like motions for leave to appeal to the Court of Appeals in actions commenced in the City and District Courts. By such practice leave would be granted only—

(1) Where the determination involved great interests or settled a principle of law affecting the decision of numerous other cases (Jackson *v.* Purchase, 1 *Hilt.* 357; and see Brand *v.* Godwin, 15 *Daly*, at p. 469); or

(2) Where the decision of the Court was in direct conflict with one rendered by a General Term of this district (Clapp *v.* Graves, 2 *Hilt.* 243).

The provision of section 1344 of the Code allowing appeals from this term to the Appellate Division, like that previously contained in section 191 permitting appeals to

the Court of Appeals, is permissive only, bears the same interpretation and requires like regulation.

A practice so long tried and respected alike by Bench and Bar is the safest test of judicial discretion to be adopted under existing conditions. We have, therefore, concluded to adhere to it for future guidance.

Leave will not be granted where the subject matter involved is trifling in amount, and the delay would work a hardship on the respondent (Ahern *v.* Nat. SS. Co., 11 *Abb. N. S.* 356), nor where the principle involved is not of sufficient importance to justify the application (Woodward *v.* Bugsbee, 2 *Hun*, 683). A novel question of evience does not present such a case (*id.* 683, 128).

As the application is not within any of the rules with the modifications stated, it must be denied, with $10 costs.

---

## LAVINIA A. DU BOIS, RESPONDENT, *v.* THE UNION DIME SAVINGS INSTITUTION, APPELLANT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT, OCTOBER, 1895.

§§ 452, 820.

*Application to substitute defendant under section 820 of the Code—rival claimants disagree as to amount due.*

In case a defendant is threatened with suit or is sued by one of two claimants to a fund for a certain sum, and by the other claimant for one-half that sum out of the same fund, and the defendant admits that he holds the larger sum, the two claimants may be compelled to interplead, but in case the defendant denies that he holds the larger sum and admits that he holds the lesser sum, he cannot compel the two claimants to interplead. In the latter case, the defendant is not entitled to an order substituting the plaintiff in one action as defendant in the other in his place and stead under section 820 of the Code.

**Lavinia A. Du Bois v. The Union Dime Savings Institution.**

Section 820 of the Code of Civil Procedure is not a substitute for the action of interpleader, but is an additional and summary remedy afforded to defendants to compel rival claimants to be brought into the action, and the right to do so by motion depends upon the same principles as the right to maintain an action of interpleader to compel rival claimants to litigate as between themselves.

Where it appears by the notice of motion that relief was sought under section 820 and not under section 452 of the Code, and it does not appear that it was suggested at Special Term that the plaintiff in the first action might be brought in as defendant in the second action under section 452, it is too late to claim for the first time on appeal that relief should have been granted at Special Term under the latter section.

(*Decided October*, 1895.)

Appeal from an order denying defendant's motion to substitute Ellenora H. Decker, in the place of the Union Dime Savings Institution, as defendant.

Prior to July 31, 1886, William F. Du Bois deposited with the defendant to the credit of "William F. Du Bois in trust for Louisa Du Bois," various sums amounting, with the accumulation of interest, on said date to $4,086.50. This account and the corresponding pass-book were numbered 138,463. Louisa Du Bois was the wife of William F. Du Bois, and, she having died, he, on the 31st day of July, 1886, surrendered pass-book No. 138,463, and had the fund $4,086.50 credited on defendant's books to "William F. Du Bois in trust for Ellenora H. Decker," which account and the corresponding pass-book then delivered to him bore the number 180,769. Ellenora H. Decker and William F. Du Bois were brother and sister. There was credited to this account for interest, January 1, 1887, $66.29, and July 1, 1887, $67.28, so that August 1, 1887, there was standing to the credit of said account, No. 180,769, $4,218.07. Before August 1, 1887, William F. Du Bois married Lavinia A., his second wife, and on that date he opened a new account with defendant in the name of "William F. Du Bois in trust for Lavinia A. Du Bois,"

which, and the accompanying pass-book, were numbered 186,416, and transferred to it $1,000 from account No. 180,769. July 30, 1890, William F. Du Bois opened another account which, and its accompanying pass-book, bore the number 226,331, with defendant, in the name of "William F. Du Bois in trust for Lavinia A. Du Bois," and transferred to it from account No. 180,769, $3,552.07, which sum, with the previous $1,000, represented account No. 180,769, and all accumulations of interest thereon. Account No. 180,769 was then closed, and the pass-book surrendered by William F. Du Bois to the bank. Afterwards (the dates not appearing), William F. Du Bois drew $25 from account No. 186,416, and $890.46 from account No. 226,331. June 12, 1894, William F. Du Bois died, and on the same day Ellenora H. Decker began an action in the Superior Court of this city against the defendant to recover $4,086.50 with the accumulations of interest thereon since July 31, 1886, not crediting the two payments of $25 and $890.46, amounting to $915.46. In that action the defendant answered, setting up substantially the foregoing facts.

December 3, 1894, this action was begun to recover $4,308.10, the amount standing to the credit of accounts Nos. 186,416 and 226,331, with the accumulations of interest thereon, crediting the defendant with $915.46, the amount of the two payments before mentioned. The defendant has not answered to this action, but admits it is owing to one or the other of the rival claimants the amount sought to be recovered in this action, and moved, at Special Term, for an order substituting Ellenora H. Decker as a defendant in its stead in this action, offering to pay into Court the amount claimed herein, which is $915.46 less than the amount claimed by Ellenora H. Decker in her action.

*C. N. Bovee*, Jr., for appellant.

*G. W. H. Zeglio*, for Ellenora H. Decker, respondent.

*Peter S. Carter*, for Lavinia A. Du Bois, respondent.

FOLLETT, J.—This is not an action brought by the bank against the two rival claimants of the sum on deposit to compel them to interplead, but it is a motion made, pursuant to section 820 of the Code of Civil Procedure, by the bank, the defendant in two actions brought by the claimants, to substitute Ellenora H. Decker, the plaintiff in the first action, now pending in the Superior Court, as a defendant in the place of the bank in the second action brought by Lavinia A. Du Bois against it. Lavinia A. Du Bois consents that Ellenora H. Decker be substituted as defendant in the place of the bank in this action. The defendant offers to pay into Court, pursuant to section 820, Code of Civil Procedure, or to hold, pursuant to section 115 of chapter 689 of the Laws of 1892, the sum claimed by Lavinia A. Du Bois, but it does not offer to pay into Court, or to hold subject to the final determination of the controversy, the sum which Ellenora H. Decker seeks to recover, which is $915.46, besides interest, more than the bank admits to be due from it. Section 820 of the Code of Civil Procedure is not a substitute for the action of interpleader, but is an additional and summary remedy afforded to defendants to compel rival claimants to be brought into the action (Beck *v.* Ryback, 9 *How. Pr.* 193; Cronin *v.* Cronin, 9 *Civil Proc. R.* 137; s. c., 3 *How. Pr. N. S.* 137). The right of a defendant to compel rival claimants to be brought into an action by motion depends upon the same principles as the right to maintain an action of interpleader to compel rival claimants to litigate as between themselves.

Though the relations between a savings bank and the owner of the credit be that of debtor and creditor, rival claimants "for the same fund" or credit may be inter-

pleaded and compelled to determine, as between themselves, their respective rights to the fund (chap. 689, Laws of 1892, sec. 115, the Banking law). But the difficulty with granting the defendant the relief sought under section 820 of the Code of Civil Procedure is that these rival claimants do not seek to recover "the same fund," credit or sum. The amount which Ellenora H. Decker seeks to recover in her action being greater than the amount which the defendant admits to be due, it is not entitled to have her substituted in this action brought by Lavinia A. Du Bois to recover a less sum, which the defendant admits to be due from it (Baltimore & Ohio R. R. Co. *v.* Arthur, 90 *N. Y.* 234; New England Mutual Life Insurance Co. *v.* Odell, 50 *Hun*, 279; Van Zandt *v.* Van Zandt, 26 *N. Y. St. Rep.* 963; s. c., 7 *N. Y. Supp.* 706; 17 *Civ. Proc. R.* 448; Sibley *v.* Equitable Life Assurance Soc. of U. S., 24 *J. & S.* 274; s. c., 8 *N. Y. Supp.* 8; Dodge *v.* Lawson, 19 *N. Y. Supp.* 904; s. c., 22 *Civil Proc. R.* 112; Bender *v.* Sherwood, 17 *How. Pr.* 258; Supervisors of Saratoga Co. *v.* Seaburg, 11 *Abb. N. Y.* 461; Crane *v.* McDonald, 118 *N. Y.* 648; s. c., 2 *Silv. Ct. App. Cases, note*, 341, 358; Chamberlain *v.* O'Connor, 1 *E. D. Smith*, 665; Patterson *v.* Perry, 14 *How. Pr.* 505; Moore *v.* Usher, 7 *Simons*, 383; Glyn *v.* Duesbury, 11 *id.* 139; Diplock *v.* Hammond, 23 *L. J. Ch.* 550; s. c., 28 *Eng. L. & Eq.* 202; Bridesburg Manuf. Company's Appeal, 106 *Penn. St.* 275; Glasner *v.* Weisberg, 43 *Mo. App.* 214; *Story's Eq. Pldgs.* [10th ed.], sec. 291; 2 *Story's Eq. Jur.* [13th ed.], sec. 821 *et seq.*; 3 *Pom. Eq. Juris.*, sec. 1323).

Had the bank admitted that there was due from it a sum equal to that claimed by Ellerona H. Decker, the largest sum, then the rival claimants might have been compelled to litigate their claims as against each other (Keenig *v.* N. Y. Life Ins. Co., 14 *N. Y. St. Rep.* 250; s. c., 14 *Civil Pro. R.* 269; Progressive Handlanger Union No. 1 *v.* German Savings Bank, 25 *J. & S.* 594; s. c., 29 *St.*

*Rep.* 528; 23 *Abb. N. Y.* 42; Yates v. Tisdale, 3 *Edw. Ch.* 71; Fargo v. Arthur, 43 *How. Pr.* 193). But we know of no authority authorizing an interpleader, by action or motion, when the stakeholder denies that the full amount demanded by one of the rival claimants is due. The rule deducible from the authorities is, in case A. is threatened with suit or is sued by B. for $1,000 and by C. for $500 of the same fund, and A. admits that he holds $1,000, B. and C. may be compelled to interplead, but in case A. denies that he holds $1,000 and admits that he holds $500, he cannot compel B. and C. to interplead. The bank was not entitled to an order substituting Ellenora H. Decker as a defendant in its stead, under section 820 of the Code.

The learned counsel for the bank now insists that the motion should have been granted under section 452 of the Code of Civil Procedure, which provides:

"Sec. 452. The Court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights, but where a complete determination of the controversy cannot be had without the presence of other parties, the Court must direct them to be brought in. * * *"

The difficulty with this contention is that the motion was not made under the section last quoted. It appears by the notice of motion that relief was sought under section 820 and not under section 452 of the Code, and it does not appear that it was suggested at Special Term that Ellenora H. Decker might be brought in as a defendant under section 452, and it is too late to claim for the first time on appeal that relief should have been granted at Special Term under the latter section.

The order must be affirmed, with $10 costs and disbursements.

VAN BRUNT, P. J., and O'BRIEN, J., concurred in the result.

# HERBERT L. HARDING AND EDWARD J. H. TAMSEN, AS SHERIFF OF NEW YORK COUNTY, APPELLANTS, v. JOHN M. ELLIOTT, RESPONDENT, IMPLEADED WITH LUTHER KOUNTZE, HERMAN KOUNTZE, CHAS. B. KOUNTZE, WILLIAM H. HOLLISTER AND ANNIE C. SEVERANCE.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT, DECEMBER, 1895.

§§ 649, 655, 1022.

*Action to set aside assignment in aid of an attachment—creditors entitled to collect their claims out of property of non-resident debtors conveyed for purpose of defrauding creditors.*

Under the Code of Civil Procedure (§§ 649, 655) property held by fraudulent transferees may be attached by the creditors of a fraudulent transferer, and the conveyance set aside by an action brought by a sheriff in aid of the attachment.

Where a fraudulent transferer was a non-resident, and the summons in an action in which an attachment had been granted had been served by publication, the defendant not appearing, but having made default, and no judgment having been recovered, *Held*, that the right had been established to have the transfer set aside.

Where a judgment is entered under § 1022 of the Code of Civil Procedure on a decision not stating separately the facts found, the Appellate Court is required to review all questions of fact and law, and is authorized to grant either party the judgment which the facts warrant without a new trial.

(*Decided December*, 1895.)

Appeal from an order dismissing the complaint on the merits, entered on a decision of the Special Term.

*John S. Melcher*, for appellants.

*David Murray*, for respondent.

FOLLETT, J.—This action was begun October 5, 1893,

to set aside an assignment of Annie C. Severance to John M. Elliott of $15,000 on deposit with Kountze Bros., on the ground that it was made with intent to hinder, delay and defraud the plaintiff Harding. The action was brought by leave of the Court, in aid of an attachment, pursuant to article 2, title 3, chapter 7 of the Code of Civil Procedure.

June 27, 1893, Herbert L. Harding began action in the Supreme Court against Annie C. Severance to recover a judgment for $10,100 alleged to be due him from her for professional services and disbursements rendered in the State of Massachusetts, of which State the plaintiff is a resident. Mrs. Severance is resident of the State of California, and the summons was served on her by publication June 29, 1893, but she has not appeared in the action and no judgment has been entered therein. June 27, 1893, an attachment was granted in the action, which, June 29, 1893, was served on Kountze Bros., bankers in the City of New York, who then held on deposit $148,125 belonging to Annie C. Severance. This deposit was held under the following receipt:

"KOUNTZE BROTHERS, Bankers,

$148,125. "New York, June 27, 1893.

"Received from Merchants' Natl. Bk., N. Y., one hundred and forty-eight thousand one hundred and twenty-five dollars, which, at their request, we credit to account of Bank of America, Los Angeles, Cal., for use of Annie C. Severance, as per our letter of advice No. 9525 issued this day.

"Per pro KOUNTZE BROTHERS,

"H. R. PHILLIPS."

July 3, Mrs. Severance appeared specially in the action and served a notice of motion for July 11, 1893, for an order vacating the attachment, which motion was granted July 20, 1893, and the next day an order vacating the

attachment was entered. After the service of the first attachment and before July 15, 1893, Kountze Bros. paid out all of the money held under the foregoing receipt upon the checks of the Bank of America, except $15,000. July 20, 1893, a second attachment was issued in the action, which on the same day was served on Kountze Bros., who, on the day following, gave the Sheriff this certificate:

"HON. JOHN J. GORMAN, Sheriff,
"City and County of New York.

"DEAR SIR,—As a return to the writ of attachment served upon us July 20th, 1893, in the above entitled suit, we have to state that the balance of the moneys, to wit, fifteen thousand dollars ($15,000), remaining out of the moneys heretofore deposited with us June 27th, 1893, by the Merchants' National Bank, of New York, for the credit of the Bank of America, of Los Angeles, California, for the use of Annie C. Severance with them, was, on or before July 12th, 1893, assigned by the said Annie C. Severance to J. M. Elliott, who, we understand, is a resident of the State of California. The said $15,000 (fifteen thousand dollars) is still in our possession.

"Yours respectfully,
"KOUNTZE BROS."

Upon the levy of the first attachment Kountze Bros. telegraphed the fact to the Bank of America at Los Angeles, which, July 12, 1893, telegraphed Kountze Bros. as follows:

"Referring to letter Van Slyck 6th, accept his instructions in disposing of special $15,000 so that second attachment cannot lie. When delivered deposit less counsel fees and just charges with First National Bank for personal credit J. M. Elliott. Advise by telegram such deposit."

Kountze Bros. did not make the deposit, pursuant to this telegram, but held the fund until July 13, 1895, when

they paid it over to the Farmers' Loan & Trust Company, pursuant to an order of the Special Term, entered July 8, 1895. Kountze Bros. had previously answered in the action, but on making this deposit they were discharged from further liability and have no further interest in the result of this litigation, which has become simply a contest between the plaintiff and John M. Elliott as to which has the better right to the fund.

The learned Justice who rendered the judgment appealed from did not "state separately the facts found," but filed "a decision stating concisely the ground" on which the issues were decided, as permitted by § 1022 of the Code of Civil Procedure, as amended in 1894; and so the issue whether the transfer by Annie C. Severance to John M. Elliott of the fund held by Kountze Bros. was made with intent to hinder and delay Herbert L. Harding, has not been specifically determined. However, the learned Justice in his opinion states that the evidence would fairly justify a finding that the transfer was made to prevent Harding from collecting his debt. The testimony of Annie C. Severance and of John M. Elliott, read in connection with the documents in evidence, shows beyond doubt that the transfer by her to him of the $15,000 standing to her credit with Kountze Bros. was made by her and received by him for the sole purpose of hindering, delaying and preventing the plaintiff from collecting a just debt (the amount of which only was in dispute) by means of an action brought in this State. It is asserted that a conveyance made for this purpose by a person having ample property in another State to pay all her debts is not fraudulent, and that it is necessary to show the insolvency of the debtor. We think that the solvency of Mrs. Severance does not render the transaction valid, for it is shown beyond dispute that she has no other property within this State, and that by this transfer she sought to prevent Harding from enforcing his demands by an action. It is enough

under the statute if the creditor is hindered or delayed in the collection of his debt by a transfer executed for that purpose.

In Chamley v. Dunsany (2 *Sch. & Lef.* 690, 714), it was held by the House of Lords that a conveyance by a debtor, made with intent to hinder or delay his creditor, may be set aside, though the creditor has sufficient property remaining undisposed of, out of which the debt could have been collected. This rule was declared by Lord Eldon in the case cited, and, so far as we know, has never been questioned. It was distinctly recognized in Fox v. Moyer (54 *N. Y.* 125), where it was held: "It is only when one makes a voluntary conveyance in good faith, with no intent to defraud his creditors, that it will be upheld by proof showing that when he made it he retained an ample estate to pay all his debts."

In Kimball v. Thompson (58 *Mass.* 411), it was held that a conveyance by a debtor of his property to prevent it from being attached was void, although the debtor believed that it would be better for his creditors to make the conveyance and intended in the end to pay all his creditors. The same rule was declared by Mr. Justice Story in Bean v. Smith (2 *Mason*, 252, 284), in which he said: "It is far from being necessary in all cases that it should appear that a creditor would sustain a loss unless a fraudulent conveyance be set aside."

In Hager v. Shindler (29 *Cal.* 48), it was held that if the conveyance were made with intent to hinder or delay creditors, it should be set aside without regard to the financial condition of the fraudulent transferer. It was tersely said in that case: "A rich man may make a fraudulent deed as well as one who is insolvent."

The same principle was recognized in Billings v. Russell (101 *N. Y.* 226), where it was held that a mortgage given to secure a just debt might be set aside by a creditor, if it were shown that the parties to the instrument executed

it for the purpose of preventing the property mortgaged from being reached by a creditor.

We have no doubt that the transfer attempted to be made by Mrs. Severance to the defendant Elliott was fraudulent and void as against Harding, and that Elliott held the $15,000 as trustee *ex maleficio* for Harding. The only remaining question is, can the interest of Mrs. Severance and Elliott be reached by an attachment and an action brought in aid thereof?

In 1888 it was held that the right of a creditor to set aside a fraudulent transfer by a debtor could not be enforced through an attachment, and an action brought in aid thereof, unless the creditor had recovered a judgment for his debt (Throop Grain Cleaner Co. *v.* Smith, 110 *N. Y.* 83; s.c., 34 *Hun*, 91; 3 *How. Pr., N. S.* 290). In 1889 (C. 504, L. 1889) subdivision 4 was added to section 649 and subdivision 2 to section 655 of the Code of Civil Procedure.

"Sec. 649. * * * Subdivision 4. Upon property discovered in any action brought as prescribed in subdivision 2 of section 655 of this act, by entering in the proper clerk's office the judgment rendered in said action, and thereafter levying on said property in the manner prescribed in subdivisions 1, 2 and 3 of this section.

"Sec. 655. * * * Subdiv. 2. Where the summons was served without the State or by publication, pursuant to an order obtained for that purpose as prescribed in chapter fifth of this act; and where the defendant has not appeared in the action (otherwise than specially), but has made default and before entering final judgment the Sheriff may, in aid of such attachment, maintain an action against the attachment debtor, and any other person or persons, or against any other person or persons, to compel the discovery of anything in action, or other property belonging to the attachment debtor; and of any money, thing in action, or other property due to him, or held in

trust for him, or to prevent the transfer thereof, or the payment or delivery thereof, to him or any other person, and the Sheriff may, in aid of such attachment, also maintain any other action against the attachment debtor and any other person or persons, or against any other person or persons, which may now be maintained by a judgment creditor in a Court of equity, either before the return of an execution in aid thereof or after the return of an execution unsatisfied. The judgment in any of the above mentioned actions must provide and direct that the said property shall be applied by the Sheriff to the satisfaction of any judgment which the plaintiff may obtain in the attachment action."

It is apparent, we think, that these provisions were added to the Code to change the rule declared in the case last cited, and to enable creditors to collect their debts out of the property of non-resident debtors which should be conveyed for the purpose of defrauding creditors, and that under the Code as amended property held by fraudulent transferees may be attached by the creditors of a fraudulent transferer and the conveyance set aside by an action brought by the Sheriff in aid of the attachment. That such was the purpose of the section is held in Backus *v.* Kimball (62 *Hun*, 122), and in Whitney *v.* Davis (88 *id.* 168). The case provided for by section 655 is precisely the one at bar. The fraudulent transferer is a non-resident of the State; the summons in the action in which the attachment was issued has been served by publication; the defendant has not appeared, but has made default, and no judgment has been recovered. These facts are alleged in the complaint and were proved on the trial, and we are of the opinion that the plaintiffs established the right to have the transfer set aside as fraudulent. Under section 1022 of the Code of Civil Procedure, when a judgment is entered on a decision which does not state separately the facts found, this Court is required to review all questions

of fact and law, and is authorized, instead of granting a new trial, to grant to either party the judgment which the facts warrant. The fraudulent character of the transfer being established by the testimony of the defendant Elliott and by Mrs. Severance, the fraudulent transferer, there is no reason for a new trial of the issue, and a judgment should be ordered reversing the judgment of the Court below, with costs, and declaring that the transfer from Mrs. Severance to the defendant Elliott was fraudulent and void as against the plaintiff Harding; that it should be set aside, and the money paid over by Kountze Bros. to the Farmers' Loan and Trust Company should be held to be subject to the attachment and paid over in satisfaction of the debt of Harding when the amount thereof shall be judicially settled. The plaintiffs are entitled to costs in this Court and in the Court below, to be taxed, and the judgment to be entered thereupon will be a lien on the fund and payable therefrom.

All concur.

---

## ESTATE OF JOHANNA LICHTENSTEIN.

SURROGATE'S COURT, NEW YORK COUNTY, JANUARY, 1896.

§§ 2752, 2759.

*Payment of debts of decedent—personal estate must be exhausted before recourse can be had to his real estate.*

If a decedent, at the time of his death, left sufficient personal property which could have been applied to the payment of his debts and funeral expenses in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statutes for the sale of his real estate for the payment

of his debts. In that event the personal property is the fund for the payment of his debts, and the creditors must resort to that through the executors or administrators. If they waste or squander the personal property so that it becomes insufficient for the payment of the debts, the only resort of the creditor is to them, to enforce their personal responsibility, and they cannot in that case cause the real estate to be sold under the statutes referred to.

(*Decided January*, 1896.)

Proceeding for the disposition of decedent's real estate toward the payment of his debts.

*Steinhardt & Goldman*, for petitioning creditor.

*Rose & Putzel*, for executors.

ARNOLD, S.—The question which was suggested to counsel in this matter was not as to whether the petition contained the necessary allegations giving this Court jurisdiction to issue citations to the necessary parties to the proceeding, but whether certain allegations therein made, —and which, as the petitioner applies as a creditor only, were unnecessary to be made a part of the petition under section 2752, subd. 4, of the Code,—if true, would not render the proceedings futile, the present application being for a decree under section 2759, Code. Whether proceedings for the sale of the real estate of a decedent to pay debts are instituted by a creditor or by an executor or administrator before a decree can be made for such sale, proof must be made as provided in subd. 5 of the last named section. The petition herein states that all the personal property of the testatrix has been applied by her executor to the payment of her funeral expenses, and the excess thereof, if any, paid over to her children as legatees under her will. Of course, if there was no such excess a deficiency of personal assets necessary to pay debts would be shown; if, on the contrary, such excess existed and it was

distributed among the legatees, a question would then arise as to whether the proof required by section 2759, subd. 5, could be made. In Kingsland *v.* Murray (133 *N. Y.* 170), which was a proceeding instituted by an administratrix *de bonis non* for the sale of real estate to pay debts, it appeared that the decedent left personal property in excess of his debts, which came into the hands of the original administrator, who was the son and only heir at law of the intestate, and for which he had never accounted. His letters had been revoked and the petitioner appointed in his place. The Court, at page 174, referring to the provision of the Code last above mentioned, says: "There seems to be some difference of opinion between the Surrogate and the General Term as to the scope and meaning of this provision. We think the meaning is reasonably free from doubt. If the decedent at the time of his death left sufficient personal property, which could have been applied to the payment of his debts and funeral expenses in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statutes for the sale of his real estate for the payment of his debts. In that event the personal property is the fund for the payment of his debts, and the creditors must resort to that through the executors or administrators. If they waste or squander the personal property so that it becomes insufficient for the payment of the debts, the only resort of the creditor is to them, to enforce their personal responsibility, and they cannot in that case cause the real estate to be sold under the statutes referred to. * * * So in the language of this section, before the Surrogate can make a decree for the sale of real estate, the petitioner must establish that all the personal property of the decedent which could have been applied to the payment of the decedent's debts and funeral expenses has been so applied." And it is further held that if the executors or administrators have proceeded with reasonable diligence in converting the personal prop-

erty into money and applying it to the payment of the debts and funeral expenses, and it is insufficient for the payment of the same, then, even if it has not all been so applied at the time of the petition, the Surrogate is authorized to make the decree; and at page 176, it is further said that under this construction of the statute an irresponsible executor or administrator may so waste and misappropriate the personal property of a decedent that none of it could be applied to the payment of his debts, and that thus a proceeding to sell the real estate could not be maintained, as it could not be shown that the executor or administrator had proceeded with reasonable diligence in converting and applying the personal property to the payment of debts; and there may, therefore, be cases, although rare, where the creditors may not be able to compel the sale of the real estate of the decedent for the payment of their debts under the provisions of the Code referred to; and the Court then proceeds to point out other remedies which creditors may have in such cases, among which is the right of action against the next of kin who have received any of the personal property. In the present case the petition shows that no publication of notice requiring creditors to present their claims has ever been made. Meanwhile the real estate has been conveyed by all the devisees but one to that one, who has been cited, but neither opposes nor consents to the present application. Notwithstanding such default, however, the Surrogate must, before granting a decree of sale, have before him all the proofs required by the statute. The decision in Kingsland *v.* Murray does not draw any distinction between cases of executors and cases of administrators, but applies a general rule in respect to administration by either. In matter of Bingham (127 *N. Y.* 296), decided in the Second Division of the Court of Appeals about a year earlier than the decision of Kingsland *v.* Murray case, some general language is used at pages 309–310, which appears to draw

a distinction between cases of administrators who give bond and those where executors have squandered the personal property which came into their hands as such, but in that case it appeared that the personal property applicable to the payment of debts was not at any time sufficient to make such payment in full. In the Kingsland case the administrator, who was also the only next of kin and heir at law, had appropriated the personalty to his own use, and in the present case the executor, who was a son and one of the devisees and heirs at law of the testatrix, divided the personalty between himself and his co-devisees. These two cases are therefore practically alike in their circumstances. The petitioner herein should have the opportunity of showing the amount of personalty which came to the executor's hands, the debts owing by the testatrix and the disposition made of the personalty, so that it may be ascertained whether all of such personalty which could have been applied to payments of the decedent's debts has been so applied, or that the executor has proceeded with reasonable diligence in converting the personal property into money and applying it to the payment of these debts and funeral expenses, and that it is insufficient for the payment of the same; and a reference is ordered to take proofs as to such matters, as well as to all other matters required to be established by the decree prayed for herein, under section 2759 of the Code.

# EVERETT E. SALISBURY v. JAMES GORDON BENNETT.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK, MARCH, 1896.

§§ 384, 401, 635.

*Motion to amend answer by setting up Statute of Limitations.*

The defendant in a libel suit before the action was begun left this country for Europe where he sojourned continuously for two years, still however retaining his legal residence and domicile within the State of New York; at the expiration of said time, through an amendment of the Code of Civil Procedure, plaintiff was enabled to and did serve the summons and complaint to which the defendant answered. The defense of the Statute of Limitations was not interposed when the answer was served for the reason that under the decisions of the State Courts as they then stood, defendant's counsel assumed that it was a defense which he could not establish, but a recent decision of the State Court of Appeals in Hart v. Kip (148 *N. Y.* 306), construing section 401 of the Code, led him to believe that such defense could be established and defendant now asks leave to set it up.

*Held*, that defendant would gain nothing by his amendment if it were allowed, and if the converse were true, it would be so grossly inequitable to permit him thus to defeat the plaintiff's claim, that his application must be denied.

When application is made to the favor of a Court for leave to interpose any defense, and the application is one resting in discretion, all the circumstances of the case will be considered, and care taken not to sanction any such abuse of procedure as would shock the conscience.

Hart v. Kip, 148 *N. Y.* 306, distinguished.

(*Decided March*, 1896).

Motion by defendant for leave to amend his answer by setting up the Statute of Limitations.

*John A. Taylor*, for plaintiff.

*John Townshend*, for defendant.

LACOMBE, Circuit Judge.—This is a motion for leave to amend the answer by setting up the Statute of Limitations. The action is for libel and the limitation is two years (*N. Y. Code Civil Procedure*, § 384). The defense was not interposed when the answer was served for the reason that under the decisions of the State Courts as they then stood, defendant's counsel assumed that it was a defense which he could not establish. The recent decision of the State Court of Appeals in Hart *v.* Kip (148 *N. Y.* 306), reversing same case (74 *Hun*, 412), and construing section 401 of the Code, however, has led him to believe that such defense can be established, and he now asks leave to set it up.

This section 401 provides that "if after a cause of action has accrued against the person, he departs from and resides without the State and remains continuously absent therefrom for the space of one year or more, * * * the time of his absence * * * is not a part of the time limited for the commencement of the action." The Court of Appeals held in Hart *v.* Kip that when a person retains his residence and domicile in this country, continuous absence as a mere sojourner in another country, or in many countries, no matter how prolonged, will not suspend the running of the Statute of Limitations under this section.

The facts of this case are as follows: The libel was published in defendant's newspaper on November 27, 1892, on which day the cause of action arose. On May 13th, 1893, the defendant left this port for Europe, where he has sojourned continuously ever since, still, however, retaining his legal residence and domicile in this city. On June 14, 1894, more than five months before the expiration

of two years after the cause of action arose, plaintiff placed the summons and complaint in the hands of the U. S. marshal for service. As the plaintiff was by that time in Europe, personal service of the summons could not be effected. Nor could he be served under section 435, which provides for substituted service upon a resident, for under the decisions that section does not apply where defendant's residence outside of the State is known. Nor could plaintiff proceed by publication, because the case was not one in which an attachment could be obtained, and if defendant did not voluntarily appear judgment by default could not have been entered against him upon proof of service by publication (§§ 428, 1216, 1217, 635). Defendant's act, therefore, in departing from the State and remaining absent therefrom, effectually prevented plaintiff from beginning his action.

On September 1, 1895, nearly three years after the cause of action accrued, an amendment of the Code extended the provisions of sec. 635 as to the issue and levy of attachments, for the first time extending that provisional remedy to a case such as this, where the action is to recover a sum of money only, as damages for an injury to *person* or property in consequence of negligence, fraud or other wrongful act. Thereupon defendant voluntarily appeared in the action by his attorneys and served an answer November 29, 1895.

The old rule which discriminated against the defense of the Statute of Limitations *per se* as unmeritorious and not entitled to the same consideration as other defenses is no longer as strictly enforced as it once was (McQueen *v.* Babcock, 8 *Abb. Ct. App. Dec.* 132; Arnold *v.* Cheeseborough, 33 *F. R.* 571). The excuse given for not pleading this defense originally is a reasonable one. It was hardly to be supposed that section 401 would be so construed as defendant now contends it has been. Nevertheless, when application is made to the favor of a Court

for leave to interpose any defense, and the application is one resting in discretion, all the circumstances of the case will be considered, and care taken not to sanction any such abuse of procedure as would shock the conscience. If defendant correctly interprets the decision in Hart *v.* Kip, the plaintiff's cause of action was barred by the statute November 28th, 1894, although the only reason why he was unable to commence his action five months before by personal service of the summons was because defendant left the country and has ever since remained continuously absent therefrom. Nay, under such a construction of section 401, it would (except for the amendment of 1895) be possible for one person by negligence, fraud or other wrongful act to injure another, and then, by going abroad the same day and sojourning there for two years, escape all liability to respond in a civil action for the wrong.

Whether or not the decision in Hart *v.* Kip does so construe the section, is a point upon which no opinion is here expressed. It will be noted that in that case, although defendant was absent, he, to plaintiff's knowledge, had property here, and the cause of action was such that plaintiff could at any time during the six years have begun suit with a warrant of attachment. If, however, the decision in Hart *v.* Kip does require the State Courts to construe sec. 401 in the way defendant contends, it does not necessarily follow that the Federal practice would be conformed thereto. Section 914 of the U. S. Revised Statutes simply undertakes to conform the Federal practice to the State model, "as near as may be," not as near as may be possible, nor as near as may be practicable. The U. S. Supreme Court has declared that it remains still with the Federal Judges to construe and in a proper case reject any subordinate provision in such statutes as would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals (Indianapolis, etc., R. R. *v.* Horst, 93 *U. S.* 300).

Defendant therefore would probably gain nothing by his amendment if it were allowed; and if the converse were true, it would be so grossly inequitable to permit him thus to defeat the plaintiff's claim that his application should be denied.

---

## ISRAEL O. BLAKE v. GEORGE A. CLAUSEN.

SUPREME COURT, TRIAL TERM, NEW YORK COUNTY, MARCH, 1896.

§§ 383, 415.

*Statute of Limitations—trustee of corporation—failure to file annual report.*

Where a trustee of a manufacturing corporation has become liable for a debt of the corporation, because of failure to make and file its annual report, the Statute of Limitations then begins to run as to that debt, and the right of action is barred in three years thereafter; and, although the default is continued during successive years, the continuance of the default does not revive the liability or create a new one. The statute does not provide for cumulative penalties or recurring defaults, one being deemed sufficient for the protection of creditors.

As against the defendant, the Statute of Limitations begins to run when the plaintiff has it in his power to make his cause of action complete, and nothing but statutory exceptions can interrupt its running when once started, nor can one disability be tacked to another to prolong the limitation; otherwise its purpose as a statute of repose might be subverted.

(*Decided March*, 1896.)

Action to enforce statutory liability of trustee for failure to make annual report of condition of manufacturing corporation.

*Carpenter & Hassett*, for plaintiff.

*Guggenheimer & Untermyer*, for defendant.

McADAM, J.—The action is to charge the defendant, as trustee of the Brewers' Ice Company, a corporation formed under the Manufacturing Act of 1848, with $5,349.21, a balance due on a debt of $6,000 contracted December 22, 1886, for money loaned to the company by plaintiff.

The liability sought to be enforced is that specified in section 12 of the act (3 *Edm. R. S.* 735, superseded by L. 1875, ch. 510; Victory Co. *v.* Beecher, 97 *N. Y.* 651), for failure to make and publish annual reports of the condition of the corporation for the years 1887, 1888 and 1889. The statute provides that upon the failure to make the report mentioned, "all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made."

The defense is the Statute of Limitations, which applies to and bars such claims in three years (*Code*, § 383, subd. 3) from the time of the accruing of the right to relief by action (*id.* § 415).

Where a trustee of a manufacturing corporation has become liable for a debt of the corporation, because of failure to make and file annual statements as required by the provision cited, the Statute of Limitations then begins to run as to that debt, and the right of action is barred in three years thereafter; and although the default is continued during successive years, the continuance of the default does not revive the liability or create a new one (Losee *v.* Bullard, 79 *N. Y.* 404). The statute does not provide for cumulative penalties or recurring defaults, one being deemed sufficient for the protection of creditors.

When the debt was contracted, December 22, 1886, the

corporation gave its note payable in six months thereafter, and as it was given at the time the obligation was created, the remedies upon the debt were for all purposes suspended until June 25, 1887, when the note matured. As the first default occurred January 20, 1887, and the debt became enforcible on June 26, 1887, both events then concurring, the three years' limitation commenced at the latter date, and on June 27, 1890, the right of action against the defendant was by force of the statute forever barred (Losee *v.* Bullard, *supra;* Duckworth *v.* Roach, 81 *N. Y.* 49). In Losee *v.* Bullard, as in Knox *v.* Baldwin (80 *N. Y.* 610), the plaintiff's claim was past due at the time of the trustees' default, and the statute commenced to run at that time. Here the company's liability, though existing at the time of the default, was not enforcible until about five months afterwards—a circumstance which distinguishes those cases from this.

The present suit was not commenced until September 19, 1891. So that unless the operation of the statute was suspended by the extensions of time hereafter referred to granted to the corporation, the plaintiff must fail in his action.

The note which fell due June 25, 1857, was renewed by a second, payable October 28, 1887. An oral extension was then agreed upon until the spring of 1888, when a third note was given in renewal, which matured April 2, 1889; and this was renewed by a fourth note which became due April 5, 1890. These renewals were all arranged between the plaintiff and the president of the corporation, without consulting the defendant. That they suspended the operation of the six years' Statute of Limitations on the contract as against the corporation, because founded on its own acts, is without doubt; but it does not by any means follow that the running of the three-year penal statute was thereby also suspended as against the trustee without his assent. The plaintiff claims that the one

result accompanies the other, and that Jones *v.* Barlow (*supra*) sustains his contention. The facts of that case require careful consideration in order to intelligently understand it.

This action was brought against the defendants as trustees of the American Steel Lock Co., organized under the manufacturing act, to enforce the liability imposed by reason of the failure to file an annual report in January, 1871. The plaintiff during the year 1871 sold and delivered to the corporation goods for which, on December 26, 1871, it was indebted to him in the sum of $6,292.78, and the company gave its notes, maturing June 6, 1872, for that amount. On that day ten new notes were given, the first maturing one month from date, and the others at successive intervals of one month thereafter. The action was commenced February 7, 1873, and at that time three of the notes were not due. At the close of the case the defendant's counsel moved to dismiss the complaint. The defendant then requested the Court to charge that if the amount of the three notes was not due at the commencement of the action the plaintiff could not recover. The Court refused so to charge, and directed a verdict for the full amount of the indebtedness. It was held that the plaintiff was only entitled to recover the amount actually due from the corporation at the time of suit brought, and that it was error to permit a recovery for the three notes which had at that time not matured. The original debt was contracted in December, 1871, and the action was commenced in February, 1873, fourteen months afterwards, so that the Statute of Limitations was in no manner involved.

Applying the decision of the Court to the facts involved, it is at once apparent that nothing pertinent to the question at issue here was there decided. The extensions given to the corporation of course suspended the right of action against the trustees until the creditor was in a

position to prosecute the corporation. Upon a new default by it the obligation against the trustees was revived, because the debt had not been paid by the broken promise. In this case the creditor kept on extending time to the corporation until the statute had discharged all penal consequences of the default complained of, and he now claims that the legal effect of his voluntary acts suspended the running of the statute against the trustee, without any act whatever upon the part of the latter. Even in the case of joint debtors or of principal and surety the Statute of Limitations cannot be extended by the act of one so as to charge the other (Winchell *v.* Hicks, 18 *N. Y.* 558, 560; Harper *v.* Fairley, 58 *id.*, at p. 445; Church *v.* Howard, 17 *Hun*, at p. 10; McMullen *v.* Rafferty, 89 *N. Y.* 456; *In re* Patrie, 82 *Hun*, 62). In other words, no one can revive or suspend the running of the statute but the person sought to be charged or his agent authorized that purpose (Smith *v.* Ryan, 66 *N. Y.*, at p. 356; Bender *v.* Blessing, 82 *Hun*, 320; McMullen *v.* Rafferty, *supra*).

The Statute of Limitations is not dependent on the will of the creditor. The fact that he precluded himself from maintaining an action either against the company or the defendant, as trustee, until the expiration of the several extended credits, furnishes no logical reason for extending a penal liability created by the State beyond the period prescribed by its lawmaking power. To hold otherwise would permit newly elected trustees by their act and that of creditors to extend for any length of time liabilities against predecessors in office, without reference to safeguards enacted for their protection. True, an extension of time for the payment of a corporate debt will not discharge a trustee (Jones *v.* Barlow, *supra*); the mere extension will not in itself work a discharge, but the statute will effect that result if it becomes operative.

A somewhat similar question arose in an action against a stockholder (not a trustee), wherein it was held that

"the year within which an action must be begun for the recovery of a debt owing by a manufacturing corporation, so as to lay a foundation for a recovery against the stockholders, begins to run on the day the debt first became due, and if the time of its payment is extended by a promissory note which is sued within a year from the date of its maturity, but more than a year after the date when the debt for which it was given first became due, and judgment is recovered and an execution returned unsatisfied, it is not a compliance with the statute, and stockholders cannot be charged with the payment of the debt" (Hardman *v.* Sage, 124 *N. Y.*, at p. 35). There the Court also held that "the object of the statute was for the protection of creditors for a definite term, and they cannot extend it beyond the statutory limit and retain their right to recover from the shareholders." The statute limiting the remedy against trustees has the same object in view, and by analogy requires the same interpretation.

As against the defendant the statute began to run when the plaintiff had it in his power to make his cause of action complete (13 *Am. and Eng. Ency. of L.* 726). Nothing but statutory exceptions can interrupt its running when once started (*id.* 733; Rector *v.* Vanderbilt, 98 *N. Y.* 170); and one disability cannot be tacked to another to prolong the limitation; otherwise its purpose as a statute of repose might be subverted (13 *Am. and Eng. Ency. of L.* 733, 734).

For these reasons, and without considering the other questions presented by the record, there must be judgment for the defendant.

## *In re* STOWELL'S ESTATE.

SURROGATE'S COURT, CATTARAUGUS COUNTY, JANUARY, 1896.

§ 2756.

*Decedent's estate—debts allowable against real estate.*

The debts of a decedent for payment of which his real estate may be sold, and which Code Civ. Proc. § 2756, provides shall not include costs of a judgment against his executor or adminstrator, do not include costs of an action against the surviving partner of decedent. (*Decided January*, 1896.)

Proceedings in the matter of the estate of Calvin S. Stowell, deceased, for disposition of decedent's real estate for payment of debts.

*Cary, Rumsey & Hastings*, for petitioner.

*John J. Inman*, for Frank Holdridge, creditor.

*John C. Leggett*, for Ackley and others, creditors.

DAVIE, S.—The decedent died, intestate, August 4, 1892. On the 22d day of the same month, letters of administration upon his estate were granted to the petitioner, who filed his petition in this proceeding on the 22d day of June, 1895. The facts required by § 2759 of the Code of Civil Procedure to be shown preliminary to the making of a decree have been satisfactorily established. The only controversy which arises relates simply to the demands of the creditors who appear, and necessitates the determination of a single proposition.

The decedent at the time of his death was a copartner

with one Corbin. On the 16th day of October, 1894, the creditors, Ackley, Sill & Co., recovered a judgment in the Supreme Court against Corbin, as surviving partner, for the sum of $198.36 damages and $70.60 costs. On the 31st day of December, 1895, the creditor Holdridge recovered a judgment in the same court against Corbin, as such surviving partner, for the sum of $226.52 damages and $349.11 costs; and the execution issued thereon was returned wholly unsatisfied. It is conceded that the damages established by each of these judgments are proper claims to be allowed in this proceeding; but it is urged on the part of the petitioner that the costs of such actions, having accrued since the death of decedent, cannot be satisfied from the moneys derived through the instrumentality of this proceeding.

The suggestion is made on behalf of these creditors that in consequence of the insolvency of the surviving partner and the insufficiency of personal assets of the estate, if the costs, which have evidently been incurred in the enforcement of valid claims against the firm of Corbin & Stowell, are not to be adjusted in this proceeding, the claimants are left entirely remediless so far as such costs are concerned. This suggestion would not be without force if the determination of the rights of these creditors was a matter addressed to any extent to the discretion of the court; but such is not the case. Under the provisions of the statute authorizing the disposition of decedent's real estate for payment of debts and the construction placed thereon by the courts, no part of these costs can be allowed. The title to real estate upon the death of the owner intestate vests immediately in the heir. It can be taken for the payment of debts only by virtue of the statute, and the statutory provisions must be strictly pursued. Kingsland *v.* Murray, 133 *N. Y.* 170; 30 *N. E.* 845. At common law, lands descended were not chargeable with the simple contract debts of the ancestor, nor was the heir

liable upon specialty unless he was expressly named. 3 *Bl. Comm.* 430. But by Laws 1786, c. 27, such real estate was made liable to some extent for the payment of debts in case of insufficiency of personal assets; and probate courts were given authority to direct sale of such real estate upon certain conditions for that purpose. In 1801 and 1813 this liability was further extended and defined. Various provisions for the enforcement of this liability were incorporated in the Revised Statutes and the Code. Read *v.* Patterson, 134 *N. Y.* 131; 31 *N. E.* 445. By the terms of the original statute, the disposition of real estate was authorized through proceedings in probate courts solely for the payment of the debts of decedents. By a subsequent provision, this remedy was extended to funeral expenses; and, by the amendment of 1894, it was so extended as to authorize the proceeding for the payment of judgment liens existing at the time of the decedent's death. *Code Civil Proc.* § 2749. So it may be asserted with some degree of reason that, inasmuch as these various statutory provisions are to some extent in derogation of the rights of the heir at common law, the creditor seeking to avail himself of the benefits conferred should clearly show that his application comes within the intent and purview of the statute. The demands of these creditors not being for "funeral expenses," nor for a "judgment lien existing at the death of the decedent," it only remains to be determined whether the costs in the action against the surviving partner can be regarded as the debt of the decedent, within the meaning of the statute.

In Wood *v.* Byington, 2 *Barb.* Ch. 387, the Chancellor, in his opinion, says:

"The act of April, 1843, does not charge the real estate with the costs of the suit in which the judgment or decree against the personal representatives is obtained, but merely makes the judgment of decree presumptive evi-

dence of the existence and the amount of the debt due from the testator."

Under the provisions of 3 Rev. St. (6th Ed.) p. 108, authorizing the disposition of decedent's real estate "to pay his debts and funeral expenses," it was held that the effect of the statute was to limit such authority to cases of debts existing against the decedent in his lifetime, exclusive of costs incurred subsequent to his death in proceedings to enforce collection of such debts. Wood *v.* Byington, *supra;* Sanford *v.* Granger, 12 *Barb.* 392; Ball *v.* Miller, 17 How. Prac. 300.

In Hurd *v.* Callahan, 9 *Abb. N. C.* 374, Surrogate Coffin says:

"It has been repeatedly decided that the real estate of deceased persons can only be sold in a proceeding like this to pay their debts, and that the costs of actions brought against the executor or administrator to recover them are no part of such debts. This is undoubtedly the law."

The same conclusion was reached in *Re* Peck, 3 *Redf.* 345.

The present statute provides that:

"Where a judgment or decree has been rendered against an executor or administrator for a debt due from the decedent, the debt is, nevertheless, deemed a debt of the decedent to the same extent, and to be established in the same manner, and, except as prescribed in the next section, subject to the same defenses as if an action had not been brought." *Code Civ. Proc.* § 2756.

The exception referred to in the section quoted is as follows:

"The debt for which the judgment was rendered cannot be allowed as against the property in question at any greater sum than the amount recovered, exclusive of costs." *Code Civ. Proc.* § 2757, subd. 1.

If costs duly recovered against a personal representative upon a claim due from the decedent are not to be

regarded as a debt of the decedent, within the meaning of the statute, then much less can costs recovered in an action against the surviving partner of such decedent be allowed in proceedings like this. While none of the decisions above cited are directly in point, they all indicate a disposition on the part of the courts to limit the recovery in such proceedings to the amount actually owed by the decedent at the time of his death.

Ordered accordingly.

---

## CHARLES KRONE, RESPONDENT, v. FREDERICK E. KLOTZ AND FREDERICK BELTZ, THIRD PARTY, APPELLANTS.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, APRIL, 1896.

§ 2447.

*Supplementary proceedings—order requiring third person to pay over money the ownership of which is in dispute.*

Where a substantial dispute exists as to the ownership of a sum of money, an order made in supplementary proceedings requiring a third person to pay over to the sheriff, to be applied upon a judgment, said sum of money, is improper and will be set aside.

Where an attorney had collected a sum of money for his client, a judgment debtor, and said attorney, although he had been paid for the services involved in such collection, claimed the balance of the money for other professional services; *Held*, that the ownership of the judgment debtor of the fund in question did not so clearly and conclusively appear as to warrant an order in supplementary proceedings requiring the attorney as a third party to pay the same over to the Sheriff to be applied upon the judgment.

(*Decided April*, 1896.)

Appeal from an order made in supplemental proceed-

ings requiring a third person to pay over to the Sheriff, to be applied upon a judgment, a sum of money alleged to belong to the judgment debtor.

The appellant, the third person, had acted as attorney for the judgment debtor in an action against the Germania Publishing Company, and had received in that action for his client $350, about January 1, 1895. The appellant was paid for his services in the action $150, and the balance, $200, he held for his client, the judgment creditor. His client had another claim against the Germania Publishing Company, growing out of the alleged fraudulent issue to him of stock in the company, and a suit was in contemplation. Appellant also rendered services for the judgment debtor and others in the organization of a corporation in the State of New Jersey, for which he was to be paid $150, but had been paid nothing, and his client had acknowledged this claim. April 13, 1895, the appellant wrote his client, saying, among other things, that his client's draft upon him for any amount not exceeding the $200 in his hands belonging to his client would be honored. April 16, 1895, the Sheriff, having an attachment in this action against the property of the judgment debtor, served a notice thereof upon the appellant, and pursuant thereto the appellant gave the Sheriff a certificate to the effect that he held $200 of his client's money in his hands, subject to the appellant's lien for fees. August 26, 1895, and again October 16 and 18, 1895, the appellant was called and examined in these supplemental proceedings and the foregoing facts appeared. The appellant then claimed that he was entitled to retain the $200 for his services in the suit which was in contemplation, but was never commenced, and for his services in organizing the New Jersey corporation, all of which services were worth fully $200.

Upon this condition of things appearing, the Court made the order appealed from.

*Fulton McMahon*, for appellant.

*Julius J. Frank*, for respondent.

WILLIAMS, J.—It seems to be conceded by counsel for respondent that if there was a substantial dispute as to the ownership of the $200, the order appealed from was improperly granted, under section 2447, Code of Civil Procedure, and this is true. Wherever such dispute exists in good faith the Court cannot settle such dispute in supplementary proceedings, but should leave the parties to their action (Rodman *v.* Henry, 17 *N. Y.* 482; Banks *v.* Pugsley, 47 *N. Y.* 368; Barnard *v.* Kobbe, 54 *N. Y.* 516; Waldron *v.* Walker, 43 *St. Rep.* 605).

The fact of ownership should be clearly and conclusively established in order to warrant the making of the order to pay over the money under this section of the Code. The appellant claimed a right to retain these moneys for services by him for the judgment debtor in proceedings other than the suit in which the money was recovered. The rendering of such other services and the value thereof were proven and apparently were uncontradicted. But if there was any conflict of evidence in reference thereto, the judge had no power to determine the question of fact in these proceedings. The appellant claimed that he had a general lien upon the money for these services. That such lien exists and enables the attorney to hold the money as against the judgment debtor himself seems to have been frequently held in this State (*In re* Attorney, 87 *N. Y.* 521; Ward *v.* Craig, 87 *N. Y.* 550; *In re* Knapp, 85 *N. Y.* 284; Bank *v.* Todd, 52 *N. Y.* 489).

Our attention is called to the case of Williams *v.* Ingersoll (89 *N. Y.* 508), which it is claimed held that such lien was confined to the judgment in the same action in which the services were rendered for which the lien was

claimed. Let us see what these various cases do really decide. In Bank v. Todd (above) the action was to foreclose a mortgage. After the decree in foreclosure was made a receiver of the plaintiff was appointed. He continued the same attorney, who caused the mortgaged property to be sold and received the proceeds of such sale. Besides their costs and fees in that action, the attorneys retained from such proceeds to apply upon the indebtedness of their client to them for other professional services. The Court held that the attorneys had a lien upon the papers in the foreclosure suit not only for costs and charges of that suit, but for any general balance due them for any other professional service; that this rule was not peculiar to attorneys, but applied to an ordinary factor who had a lien upon goods consigned to and received by him for unpaid balances theretofore accrued.

*In re* Knapp (above) the petitioner applied to the Court to compel her attorneys to pay over to her $4,411.50, alleged to have been unlawfully retained by him out of moneys collected for her. The deceased in his lifetime instituted proceedings to recover moneys due him from the City of New York for the erection of an armory, and employed the attorney in such proceedings. At his death the proceedings were pending, and thereafter the petitioner was appointed as executrix and continued the same attorney in the proceedings. Under a power from her, the attorney received from the city in the proceedings $6,781.-85. The estate was insolvent. The attorney claimed his right to retain from the money so received by him $4,411.50, not alone for his services in the particular proceedings in which the money was recovered, but in part for his services in other matters in which he had been retained by the deceased and the executrix. All of such services were rendered in the general effort to enforce the same claim. It was held that the attorney had a lien on the moneys received for all his services rendered

in connection with the claim sought to be recovered, which lien was not confined to his services in the particular proceedings in which the money was recovered.

*In re* Attorney (above) the proceeding was instituted to compel the attorney to surrender up to his client a policy of insurance delivered to the attorney for the purpose of enabling him to perfect or confirm the rights of his client therein. His client was indebted to him for other professional services, and the Courts held that the attorney's lien extended to a general balance of account for professional services, and was not confined to such services as were rendered in the litigation which terminated in the particular judgment (citing Ward *v.* Craig and *In re* Knapp, above). In Ward *v.* Craig (above) attorneys were employed to obtain a remission of a forfeiture of certain property by the United States Government. Their client made an assignment for the benefit of creditors, and the assignee retained the attorneys in the same proceeding which was continued in the name of the assignor, and resulted successfully. The action was brought by the assignee to recover from the attorneys the money received by them from the U. S. Government. It appeared that while this proceeding was pending and before the assignment was made, there was a criminal action against the assignor at the suit of the U. S. Government, and a civil action for customs due; and after the assignment there were two other actions against him on warehouse bonds, and in all these actions these same attorneys were employed. There were also three other civil suits for custom duties which were included in the remission proceedings, and the attorney's services in all these cases and proceedings were worth the amount the attorneys had received in the remission proceedings. It was held that the attorneys had a lien upon the money so received for their services in all of these matters. The attorneys did not set up a technical counterclaim, but they alleged the performance

of the services, their value and the right of the attorneys to retain therefor the moneys received from the Government, and this was held sufficient. The cases of Bank *v.* Todd and *In re* Knapp (above) were cited in that case.

In Williams *v.* Ingersoll (above) the plaintiffs were employed as attorneys and counsel in various suits and legal proceedings. One case was for malicious prosecution brought by their client. There was an oral agreement between them and their client that they were to be paid for their services out of any moneys their client might obtain or become entitled to from any of the suits or proceedings, and that they should have a lien for all such services, upon such moneys, which should be superior to any right their client might have. All these actions were finally by agreement submitted to an arbitrator, who awarded to their client $10,000 for malicious prosecution. The services of the attorneys in all these matters were worth $10,000. It was held that the agreement operated as an equitable assignment which attached to the award as soon as made, and was good against the client and any attaching creditor. It was said in the opinion that the attorneys could claim no general lien upon the award as attorneys, and could not base their claim to an equitable lien upon the mere promise of their client that they should be paid out of any moneys recovered, and that an agreement, oral or in writing, to pay a debt out of the designated fund, did not give an equitable lien upon the fund or operate as an equitable assignment thereof. These statements, however, were with reference to an abstract question which was not necessarily involved in the decision of the case. The attorneys were permitted to hold the award upon the theory of an equitable lien as above stated, and all that was said thereafter by the Court was clearly *obiter*, and no reference was made to the cases above analyzed, nor were any of them considered or criticised.

The theory of the order made in this case was that the

judgment debtor himself would have been entitled to recover the $200 from his attorney, the appellant, if the order had not been made. Suppose that he had sued the attorney for the money and the attorney had counterclaimed the indebtedness for his services. Would he not thereby have defeated the client's right to recover? In this condition of authorities and in view of the suggestions we have made, it cannot be said that the claim made by the appellant to the $200 was not made in good faith, or that there was no substantial dispute as to the debtor's ownership of the money at the time the order was made, or that the fact of the debtor's ownership was clearly and conclusively established. We are not called upon to determine whether, in an action between the parties, the appellant or the judgment debtor would be found to be such owner. The fact of such ownership of the debtor was in doubt, and could not therefore be determined in these supplemental proceedings. It seems to us that the Court had no power to make the order appealed from, and that such order should be reversed, with costs of the appeal, and the motion should be denied, with $10 costs.

All concur.

# THE PUBLISHERS' PRINTING CO. v. THE GILLIN PRINTING CO.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, MAY, 1896.

§ 66.

*Attorney's lien—after settlement of action.*

In an action on contract, the defendant on the last day to answer paid the plaintiff the amount claimed, and took a receipt entitled in the action specifying that the same was in full settlement, and that it was agreed that the action be discontinued without costs to either party as against the other. On the following day the plaintiff's attorney, in ignorance of the settlement, entered judgment for the full amount of the claim and costs, and issued an execution thereon to the Sheriff, who levied upon and took possession of the defendant's place of business. The defendant then moved to set aside the judgment, execution and levy, and the motion was denied unless the defendant within five days paid to the plaintiff's attorney the costs and disbursements of the action and the Sheriff's fees incurred by reason of the levy. On appeal from the order affirming the denial of said motion, *Held*, reversed.

The lien which the statutes give to an attorney upon his client's cause of action does not confer upon him a right to stand in the way of a settlement of an action which is desired by the parties and which does not prejudice any right of the attorney.

(*Decided May*, 1896.)

Appeal by defendant from order of the City Court, General Term, affirming an order made at Special Term.

*Smith & Cochrane*, for appellant.

*D. Salomon* and *C. Wehle*, for respondent.

McADAM, J.—The action was commenced November 9, 1895, by the service of a summons and complaint on the defendant to recover $291.07 due on contract. On

November 15, the last day of the six within which the defendant might appear and answer, the defendant paid the plaintiff the amount claimed, and took a receipt entitled in the action specifying that the same was in full settlement, and that it was agreed that the action be discontinued without costs to either party as against the other.

On the following day the plaintiff's attorney, in ignorance of the settlement, entered judgment for the full amount of the claim and costs, and issued an execution thereon to the Sheriff, who levied upon and took possession of the defendant's place of business. The defendant then moved to set aside the judgment, execution and levy, and the motion was denied unless the defendant within five days paid to the plaintiff's attorney the sum of $20.96 costs and disbursements of the action, and $27.64 Sheriff's fees incurred by reason of the levy; and the order provided that on such payments being made the defendant should receive an order of discontinuance in satisfaction of the judgment. Upon appeal the order was affirmed by the General Term, and from such affirmance this appeal is taken.

The plaintiff claims that under section 66 of the Code its attorney had a lien upon his client's cause of action, which could not be affected by any settlement had between the parties before or after judgment, and that he had the right to proceed as he did. A sufficient answer to this is found in the language of the Court of Appeals in Lee *v.* The Vacuum Oil Company (126 *N. Y.* at p. 587): "We are of opinion that the existence of such a lien in favor of the attorneys does not confer a right on them to stand in the way of a settlement of an action which is desired by the parties, and which does not prejudice any right of the attorneys. We do not think that such an agreement deprives a party of the right to control the management of his own cause, and to determine when the litigation shall

cease and how far it shall be extended. The client still remains the lawful owner of the cause of action, and is not bound to continue the litigation for the benefit of his attorneys when he judges it prudent to stop, provided he is willing and able to satisfy his attorneys' just claims. In fact, the lien under the agreement was intended for and operates only as a security for the attorneys' legal claims, and unless those are prejudiced by the client's contract she has unrestricted control of the subject of the action and of the terms upon which a settlement shall be effected. If it were permitted to the plaintiff's attorneys to continue the action for any purpose, it could be done only at their own expense and for the sole purpose of collecting their claims against the plaintiff. The right of recovery in such a case would be limited by the extent of their lien, and we are unable to see how they would be benefited by being permitted to prosecute such an action."

In a subsequent case (Poole *v.* Belcha, 131 *N. Y.* 200) the same Court said: "In order to warrant the Court in disregarding a settlement and release made in an action, it must be shown that to give full effect to them will operate as a fraud upon the attorney, or at least to his prejudice, by depriving him of his costs or turning him over to an irresponsible client. * * * The lien secured to an attorney by section 66 of the Code does not prevent the party who owns the judgment from receiving payment thereof and executing a discharge. When it is shown that such payment or discharge will operate to deprive the attorney of his costs, the Court has power to protect him, but it cannot be assumed that a settlement is in fraud of his rights. Until the lien of the attorney is asserted in some way, the judgment remains the property of the client" (see also Drago *v.* Smith, 92 *Hun*, 536).

The attorney is a mere agent of the client, and is supposed to follow the instructions and carry out the agreements of his principal. The act of entering judgment

and issuing execution, though performed by the attorney, was in contemplation of law the act of his principal, who was responsible therefor. If the plaintiff failed to notify its attorney of the settlement and agreement it had made, that was its misfortune, and the consequences cannot be visited upon the defendant, which had a right to assume that the plaintiff would carry out its agreement by controlling its attorney to the extent of seeing that the agreement made to discontinue was faithfully observed.

The only claim the attorney had was upon his employer, and the right conferred by section 66 of the Code was a mere security by way of lien which might or might not, according to circumstances, be necessary for the attorney's protection. If his client was irresponsible or refused to pay him, he might have applied to the Court on notice for leave to continue the action in aid of his lien on his own account and at his own risk (Murray *v.* Gibson, 22 *Hun*, 386; Goddard *v.* Trendoth, 24 *id.* 182; Dimick *v.* Cosley, 3 *Civ. Pro. R.* 141; Oliwell *v.* Vanderhalven, 26 *St. R.* 115; Pitcher *v.* Robertson, 21 *Supp.* 66); and the defendant might have secured the determination of the question whether such lien was necessary to the attorney's protection before being harassed by a judgment and a levy upon its property. The course taken gave the defendant no such opportunity. The first notice it had of the plaintiff's breach of contract was the levy on its property by the Sheriff.

A proceeding to enforce the attorney's lien in a case settled by the client before judgment is in some respects analogous to one where a settlement is made after judgment and where the client has discharged the judgment of record. The remedy in such a case is to move to vacate the satisfaction to the extent of the attorney's lien; and where it appears that the client is irresponsible, and the satisfaction is made with knowledge of the attorney's lien, and collusively, with intent to defraud him of his com-

pensation, the Court will furnish him the necessary protection (Commercial T. Co. *v.* Smith, 57 *Hun*, 176; Bailey *v.* Murphy, 136 *N. Y.* 50; Guliano *v.* Whitenack, 9 *Misc.* 562; Howitt *v.* Merrill, 113 *N. Y.* 630). But it will not do for an attorney in either of the cases put to determine for himself that the lien is necessary for his protection, and to attempt to enforce it without some application to the Court founded on notice to the adverse party.

Here the attorney entered a judgment for the amount of the client's claim, and issued an execution to collect it, with his taxable costs; and the Court below made an order that the defendant should pay the attorney not only his taxable costs, but also the Sheriff's fees for making a levy on its property.

There is nothing in the case showing that the plaintiff is irresponsible or unwilling to pay its attorney, or that he made any demand upon his client for compensation, or any effort whatever to collect his claim from it. Even assuming that the question of enforcing the lien could then be considered, there was nothing before the Court showing that the settlement was collusive or in fraud of the attorney's rights, or that it could by any possibility operate to his prejudice. There was, therefore, no justification for permitting the attorney to collect from the defendant taxable costs which his own client had agreed to pay, much less mulct it with Sheriff's fees incurred by reason of the neglect of the plaintiff to observe its agreement to discontinue the action.

It follows that the order appealed from must be reversed and the motion granted, with costs.

All concur.

## MERCHANTS' NATIONAL BANK OF NORWICH, CONNECTICUT, *v.* GEORGE HAGEMEYER *et al.*

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, APRIL, 1896.

§ 452.

*Action on promissory note for a money judgment—general assignee of makers permitted to intervene.*

In an action upon a promissory note for a money judgment, a general assignee for the benefit of creditors of the makers of the note is interested in the subject of the action, within the meaning of section 452 of the Code of Civil Procedure and such assignee on his own application may be made a party defendant. (Van Brunt P. J., and Ingraham, J., dissenting.)

(*Decided April*, 1896.)

Appeal from order making defendants' assignee a party defendant.

*A. J. Taylor*, for appellant.

*W. C. Beecher*, for respondent.

PATTERSON, J.— This is an appeal from an order made at the Special Term by which the assignee for the benefit of creditors of the defendants Hagemeyer was permitted on his own petition to be made a defendant, and directing an amendment of the summons and complaint by including such assignee as a defendant on the record. The action is upon a promissory note made by the defendants Hagemeyer, as partners under their firm name of George Hagemeyer & Son, and against Chew, an indorser. The note is dated in November 1894. On March 19, 1895, Hagemeyer made an assignment for the benefit of creditors to

one Hutchinson, the petitioner. On the 22d of April, 1895, this action was begun. The defendants Hagemeyer have interposed an answer alleging that they received no consideration for the note, that it was usurious, and that it was diverted from the purpose for which it was originally intended and given. The cause is now at issue awaiting trial.

The motion to be permitted to come in as a defendant is made on the ground that the assignee is interested in the subject of the action, and he claims the right, under section 452 of the Code of Civil Procedure, to be made a defendant in order that he may contest the plaintiff's claim. The Court below concurred in this view of his right and made the order from which this appeal is taken.

In a common-law action where a money judgment only is sought, a plaintiff had the right to make defendants only such persons as are directly liable upon the contract or cause of action sued upon, and he could not be compelled to bring in any other persons (Chapman *v.* Forbes, 123 *N. Y.*). There is no inherent power in the court to introduce a third party into the controversy against the objection of the plaintiff. But the second subdivision of section 452 of the Code of Civil Procedure has made a new rule, which authorizes a third party, *on his own application*, but not otherwise, to become a defendant in an action at law under certain circumstances (Rosenberg *v.* Solomon, 144 *N. Y.* 92). The provision of the Code referred to is as follows: "And where a person, not a party to the action, is interested in the subject thereof or any real property, the title of which may in any manner be affected by the judgment, and makes application to the Court to be made a party, it must direct him to be brought in by the proper amendment."

The question arising on this provision of the statute is one of construction. Is the authority to intervene one applying to actions at law generally, or merely to actions

in which either directly or incidentally the title to property may be affected? It is claimed by the appellant that the phraseology is susceptible of two constructions; that it should be read as authorizing the third party to intervene only when specific property is claimed. It is noticeable that all the cases to which our attention has been called and in which the third party was permitted to come into the action, related in some way to the title or to the possession of some specific property. Thus, Rosenberg *v.* Solomon (*supra*) was an action in replevin; and the People *v.* The Albany & Vermont R. R. Co. (77 *N. Y.* 232) involved title of the defendant as a lessee of property. In Johnson *v.* The Hardwood Door & Trim Co. (79 *Hun*, 407), where the point was discussed but did not directly arise, the right to intervene was suggested as existing because attached property was involved. In Lee *v.* Pfeffer (25 *Hun* 97) the disposition of specific property in the hands of the assignee in bankruptcy was involved. But in the case now before us there is no such situation presented. The right which the assignee, Mr. Hutchinson, claims is based altogether upon the contention that he is interested in the subject of the action. It is clear he has no interest whatever as assignee in the note that is sued upon, nor by the assignment have his assignors devolved upon him any direct liability as to the indebtedness arising on that note. But he is interested in the subject of the action if a judgment obtained therein will be binding either *prima facie* or conclusively upon him as fixing the amount of the Hagemeyers' indebtedness to the plaintiff. The assets of the assigned estate in his hands must be devoted to the payment of the assignors' debts as directed in the assignment; the *pro rata* shares of creditors will be increased or diminished according to the establishment or rejection of the plaintiff's cause of action. That situation certainly indicates an interest of the assignee in the result of the action. When a debtor makes an assignment for

the benefit of creditors, the assignee takes the legal estate and the creditors the equitable estate. They are protected by and through the assignee. If, therefore, the true construction of section 452 is as claimed by the appellant there can be no ground whatever for the assignee intervening. But it seems quite clear that the title referred to in that section means title to real estate, and that the provision as applicable to actions other than those in which real estate is involved makes the right to intervene dependent upon the existence of an interest in the subject of the action. What is meant by the word "subject" in this connection might be doubtful but for the fact that the Court of Appeals has given the definition. In H. B. C. Co. *v.* N. Y. C. & H. R. R. R. Co. (145 *N. Y.* 396) it is said: "In the case of Chapman *v.* Forbes (123 *N. Y.*) we held that in an action at law, pure and simple, a plaintiff could not be compelled to bring in other parties where the determination of the subject-matter involved in the action itself could be completely had between the original parties, *and where the judgment in that action would form no obstacle to any claim which a third party might thereafter make against the defendant in that action.* In an action at law of that nature, and in regard to the circumstances of that particular case, we held that the sections of the Code —§§ 452, 457—did not give to the defendant the right to have another party brought in as a party defendant where his presence was not necessary to a complete determination of their rights as between the two parties to the action." Here we have both a definition of the word, viz., that it means "the subject-matter" of the action, and a statement of the condition under which the third party will be allowed to come in, viz., where the judgment will form an obstacle to any claim which a third party may make against the defendants, which includes both a personal claim and one against property to be applied to the payment of a defendant's debts.

The petitioner in this case has brought himself within the terms of the statute as construed by the Court of Appeals. He is interested in the subject-matter of the action, because that subject-matter is the recovery of an alleged indebtedness upon a promissory note, which indebtedness if established will be the ultimate measure of the right of the plaintiff to share in the proceeds of the assigned estate. It will constitute an obstruction *pro tanto* to the other creditors of the assignors: that is to say, it will diminish their dividends by as much as would be paid to the plaintiff on account of this claim, and the assignee holding the legal title to the assets is the only person who can intervene on behalf of the other creditors, the amount of whose dividends would be affected by the establishment of the plaintiff's disputed claim. It all depends, of course, upon the position in which the assignee would be placed by the recovery of a judgment in this action. If that judgment would not be binding upon him either presumptively or conclusively, he has no interest in the "subject" or "the subject-matter," or "in the event of the action." If a judgment would be binding merely *prima facie*, it would throw upon him the burden of showing that the claim was not a valid one, and if conclusive, of course he could not attack it at all.

Hence, we are compelled to consider the question as to the effect of such a judgment upon the assignee, and we think that question is settled in this State by what was held in the case of Candee v. Lord (2 *N. Y.* 269). Such a judgment as would be obtained here, presented to the assignee, would really give rise to a simple question between creditors entitled to share in the fund, and in the case cited the following observations were made which seem to be final on the subject:

"In creating debts or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against

the latter without collusion is conclusive evidence of the relation of debtor and creditor against others: First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are through him and subject to all previous liens, preferences or conveyances made by him in good faith. Any deed, judgment or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently, neither a creditor nor stranger can interfere in the *bona fide* litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor does not arise until the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors. Where, however, fraud is established, the creditor does not claim *through* the debtor, but adversely to him, and by a title paramount, which over-reaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped. It follows from the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession, or after contestation, is upon all questions affecting the title to his property conclusive evidence against his creditors to establish, first, the relation of creditor and debtor between the parties to the record; and second, the amount of the indebtedness."

The case of Candee *v.* Lord was decided in 1849 and was recognized as authority, and its principle stated in 1891 in Brooks *v.* Wilson (125 *N. Y.* 261), where the Court says: "The defendants rely upon a class of cases which hold that a judgment recovered for a debt establishes not only the relation of debtor and creditor between the parties to the judgment, but also as to third persons,

so as to preclude them, in the absence of fraud or collusion, from questioning the validity of the judgment or denying that the debt upon which it was rendered actually existed. The case of Candee v. Lord (2 *N. Y.* 269) is a leading authority upon this point. That was a judgment creditor's action charging that the defendants had under fraudulent judgments sold the debtor's property and received the proceeds, and the defendant sought to assail the plaintiff's judgment on the ground that the indorsement upon which the action was brought was forged. No fraud or collusion was alleged or shown between the parties in the procuring of that judgment, and it was held that the defendants were bound and could not relitigate the question of forgery in the creditor's action. In several subsequent cases of the same general character, brought to set aside transfers in fraud of creditors, it was held that the defendants could not, in the absence of fraud or collusion, impeach the consideration of the judgment upon which the action was founded, or be permitted to show that the contract upon which it was rendered had in fact no existence, or was not enforceable (Burgess v. Simonson, 45 *N. Y.* 25; Carpenter v. Osborn, 102 *N. Y.* 552; Decker v. Decker, 108 *N. Y.* 128)."

It is immaterial whether the judgment was recovered before or after the assignment was made. In Candee v. Lord, the plaintiff's judgment was recovered in 1844, and the judgment attached was in 1843, and the property conveyed was also transferred prior to the recovery of the plaintiff's judgment. The cases cited establish the rule as to the binding force of the judgment, except where it is recovered by fraud or collusion.

And it may be said in addition that such a judgment could be made the basis of a creditor's bill to set aside the assignment and could not be questioned by the assignee, and he would be powerless to protect the assigned estate against it (Young v. Hermans, 66 *N. Y.* 347).

We think, for the reasons above given, the order appealed from should be affirmed, with costs.

O'BRIEN and WILLIAMS, JJ., concur.

INGRAHAM, J. (dissenting).—I cannot concur with Mr. Justice Patterson. It has been expressly held by the Court of Appeals that, but for the last sentence of section 452 of the Code, the Court would have no power in an action at law to make any one a party to the action against the protest of the plaintiff. The plaintiff has a right to select those that it will sue, and as it asks no judgment against the moving party and protests against its being compelled to sue him, I do not think that he could be made a party unless, under the express provisions of the Code, authority is given to allow him to intervene in this action, which is entirely between the plaintiff and the original defendants its debtors. So much of section 452 as is a literal re-enactment of the old section 122 applies only to equitable actions (see Chapman *v.* Forbes, 123 *N. Y.* 532). Upon the enactment of the Code of Civil Procedure, section 122 of the old Code was inserted as section 452, with the last clause added; and that provision applies as well to legal as to equitable actions. It is there provided that "where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, and makes application to the Court to be made a party, it must direct him to be brought in by the proper amendment." And in Rosenberg *v.* Solomon (144 *N. Y.* 92) this provision was construed as applying to a person who claims an interest in specific property where a replevin action is brought to recover possession of such property. It was there held that the applicants in that case, who claimed to be the legal owners of the property, had an interest in the subject-matter of the action, first, to

have their property go in discharge of their own debt; and, next, to save and retain any possible surplus beyond; and that it was their title, namely, the applicants' title, which is involved. This case is certainly no authority for the granting of this application. There the subject of the action was certain specific property. The applicants were the legal owners of the property, and the Court of Appeals held that they had an interest in the subject-matter of the action, namely, the property that the plaintiff sought to recover. This action is not brought to affect any specific property, but plaintiff seeks to recover a money judgment for the amount of a promissory note made by the original defendants. The original defendants have interposed an answer setting up a defense which, we assume, if established, will be sufficient to defeat the plaintiff's cause of action against the defendants. The only judgment that could be rendered in this action would be a money judgment against the original defendants, and it seems to me plain that the moving party has no interest in the subject matter, namely, the right of the plaintiff to recover a money judgment against the original defendants. By no amendment of the complaint would the plaintiff allege any cause of action against the respondent. The plaintiff has asked and now asks no relief against him. He is a mere volunteer seeking to interject himself into a controversy that does not concern him, and where no judgment could be granted either in his favor or against him. The Code does not give a person who is interested in the event of an action the right to intervene, but only to one interested in the subject of the action involved.

It is a little difficult to understand just what is meant by the term "subject of the action" when applied to an action which, under the old system of pleading, would be an action of debt. It was, however, defined by Peckham, J., in the case of Chapman v. Forbes (*supra*), as "The subject of the action is to obtain payment of the debt due

plaintiff from defendants." And the Court cites with approval the decision of Webster v. Bond (9 *Hun*, 437), and states that that case held "that a person bringing a legal action cannot be compelled to sue any person except such as he may elect to sue." If this definition of the meaning of the term "subject of the action" at law is correct, namely, that it is the right of the plaintiff to obtain payment of the debt due from defendants, then it seems to me clear that this respondent has no interest in the subject of this action; in fact, his interest would be advanced by the plaintiff's obtaining the payment of its claim from the defendants rather than by a resort to the fund or property in his possession.

The case of H. B. Construction Co. v. N. Y. C. & H. R. R. R. Co. (145 *N. Y.* 390) was an action foreclosing a mechanic's lien, and was decided expressly upon the ground that a case arising under the Mechanic's Lien law, "is an action peculiar to itself and one in which we think it proper that the contractor be brought in where the plaintiff's cause of action depends upon the payments made by the owner to the contractor before they were due under the terms of the contract. The existence of the fund upon which the plaintiff depends for its cause of action thus depends upon and arises out of the very subject-matter of the contracts and payments under them, and in such case we think it but fair that the litigation should be ended on that subject in one action." There was nothing said in this case as to what was the "subject" of an action at law for the recovery of money only; and the Court, in commenting on the case of Chapman v. Forbes (*supra*), said that it was there held "that in an action at law, pure and simple, a plaintiff could not be compelled to bring in other parties where the determination of the subject-matter involved in the action itself could be completely had between the original parties and where the judgment in that action would form no obstacle to any claim which a

third party might thereafter make against the defendant in that action." It seems to me that this is exactly that case. The judgment in this action will form no obstacle to any claim that a third party, namely, this respondent, may hereafter make against these defendants. Whatever right the plaintiff may have against the original defendants in this action will not expose these defendants to any claim by the respondent against them, the respondent being simply a trustee for the benefit of the original defendants' creditors.

The construction of this section claimed by the respondent would open the door to allow any creditor of the original defendants or any person who would have an interest in reducing the amount of the defendants' indebtedness, to be made a party to the action. I do not think that the Legislature could have had such an intention.

I think, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., concurs.

---

## SARAH LAZARUS *et al.* *v.* BERNHARD J. LUDWIG.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, MAY, 1896.

§ 3053

*Justice's return on appeal—time for filing.*

Section 3053 of the Code of Civil Procedure, providing that a Justice of the Peace must, after ten and within thirty days, from the service of a notice of appeal and the payment of the costs and fees, make his return to the Appellate Court, is not to be construed as forbidding him to make his return within ten days.

When a statute directs certain proceedings to be done in a certain

way, or at a certain time, and the form or period does not appear essential to the judicial mind, the law will be regarded as directory, and the proceedings under it will be held valid, though the command of the statute as to form and time has not been strictly obeyed; the time and manner not being of the essence of the thing required to be done.

(*Decided May*, 1896.)

Motion by respondent to strike cause from calendar.

*Wm. Strauss*, for motion.

*N. S. Spencer*, opposed.

By the Court.—Section 3053 of the Code provides that the Justice must, after ten and within thirty days from the service of the notice of appeal and the payment of the costs and fees, make his return to the Appellate Court. The return herein having been made within ten days from the service of the notice of appeal, the respondent claims it was prematurely filed, for the appellant was thus enabled to get the cause on the calendar for hearing at the May term, whereas if the Justice had filed his return after the ten days the cause could not have been so placed upon the calendar.

We find nothing in the statute which prevents the Justice from filing his return as soon after the service of the notice of appeal upon him as he desires. He is under no obligation to do so, for the statute does not require him to file the same within ten days; but it is not to be implied from this that he is forbidden to do it. The claim has never been made that a return filed after the thirty days deprives the Court of the right of hearing the appeal, or subjects either party to any penalty other than that of inconvenience caused by the delay. Delays in the administration of justice are not to be encouraged, and as the Justice is bound to make a return we see no reason why he may not make it as soon as he pleases, provided he offends no statute, and none has been infringed in this instance.

"In general it may be laid down as a rule, that when a statute directs certain proceedings to be done in a certain way, or at a certain time, and the form, or period, does not appear essential to the judicial mind, the law will be regarded as directory, and the proceedings under it will be held valid, though the command of the statute as to form and time has not been strictly obeyed; the time and manner not being of the essence of the thing required to be done" (*Potter's Dwarris on Statutes*, p. 226, citing numerous illustrations). The Court of Appeals applied the rule in the Matter of the Public School, etc. (47 *N. Y.*, at p. 561), reiterating the language of Lord Mansfield in King *v.* Londale (2 *Burr.* 447): "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament and clauses merely directory. The precise time in many cases is not of the essence." Statutes are directory where they relate to some immaterial matter, where a compliance is matter of convenience rather than of substance (People *v.* Schermerhorn, 19 *Barb.* 558).

As to the application of the principle to courts of inferior jurisdiction, the Court of Appeals (*In re* Empire City Bank, 18 *N. Y.*, at p. 220) has said: "But if the proceedings should be regarded as not taking place in a court of general jurisdiction, but should be assimilated to a special proceeding before an inferior magistrate, we still think the time fixed for the performance of intermediate steps, after jurisdiction had been once acquired, should be regarded as directory merely, and that an omission to perform one or more of them in time would not render the whole proceeding abortive."

There is nothing in Moench *v.* Yung (18 *Civ. Pro.* 259) or Zoller *v.* Smith (45 *Hun*, 319) which conflicts with these views.

It follows that the motion must be denied.

All concur.

## BARBARA ELLENSOHN *v.* CARL HASELBACH, JR., *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, MAY, 1896.

§§ 811, 3273.

*Security for costs—non-residence of plaintiff.*

The Court has no power to require a non-resident plaintiff to unite with the sureties in an undertaking for costs.
(*Decided May*, 1896.)

*Isaac N. Miller*, for plaintiff.

*Frank W. Arnold*, for defendants.

PRYOR, J.—In compliance with a motion by defendants for security for costs on the ground of plaintiff's non-residence, it was ordered "that the plaintiff . . . file with the clerk of this Court an additional undertaking in the sum of five hundred dollars, *to be executed by the plaintiff* and two sureties," etc. An undertaking executed by two sureties, but not by the plaintiff, was duly furnished; and because not executed by the plaintiff it was returned to her attorney. Thereupon this motion is made to dismiss the complaint unless within thirty days an undertaking be given pursuant to the order requiring its execution by the plaintiff.

The right to costs is the creature of statute, and they are not recoverable except pursuant to statutory provision (Fargo *v.* Helmer, 43 *Hun*, 17). "Where a provision of this act requires a bond or undertaking, with sureties, to be given by or on behalf of a party or other person, he need not join with the sureties in the execution thereof

unless the provision requires him to execute the same" (*Code*, § 811). By section 3273 an undertaking for costs "must be executed to the defendant by one or more sureties," and nothing in the Code exacts its execution by the plaintiff personally. Obviously, such an execution by the plaintiff would be superfluous, since already and independently of any express convention the plaintiff, if cast in the action, would be responsible for costs (*Code*, § 3229). He is the principle debtor and the parties to the undertaking are his "sureties."

Plainly, too, since it is the non-residence of the plaintiff that gives the right to security for costs, an undertaking by such non-resident would not answer the exigency of the occasion. The evident policy of the statute is to supplement the unavailable liability of a non-resident plaintiff by the accessible responsibility of a resident surety. Neither by the letter nor the reason of the law may the plaintiff be required to unite in the undertaking for costs.

The provision in the order that the plaintiff execute the undertaking, being without authority in law, is a nullity, and as such is rightfully disregarded.

Motion denied, with costs.

## JOHN J. TRUEB AND JACOB HAFELFINGER v. NEW YORK ASBESTOS MANUFACTURING CO.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§§ 446, 488, 546.

*Demurrer—cause of action obviously joint, though not so stated.*

If the interest of plaintiffs in a cause of action be obviously joint, upon demurrer it will not be deemed several because not characterized in terms as joint.

(*Decided April*, 1896.)

*Rudolph Loreck*, for defendant.

*Read J. Dilworth*, for plaintiffs.

PRYOR, J.—By demurrer the complaint is challenged for combining two causes of action which belong severally to the respective plaintiffs.

As "their cause of action" the plaintiffs allege that "at the request of the defendant" they rendered services "reasonably worth the sum of $348.60," "which the defendant agreed to pay."

A defect in a pleading, to be obnoxious to demurrer, must appear on the face of the pleading (*Code*, § 488). In respect of matters of form, a pleading must be liberally construed with a view to substantial justice between the parties (Clark *v.* Dillon, 94 *N. Y.* 370, 373); and must be deemed to allege what can be implied from its statements by a reasonable and fair intendment (Marie *v.* Garrison, 83 *N. Y.* 14; Lorillard *v.* Clyde, 86 *N. Y.* 384; Milliken *v.* Telegraph Co., 110 *N. Y.* 403; Sanders *v.* Soulter, 120 *N. Y.* 193).

Is it apparent, on the face of the complaint, that it unites causes of action attaching severally to each of the plaintiffs? In terms the averment is of a single request to the plaintiffs; of one cause of action against both; of a claim by plaintiffs of an integral sum of $348.60, and of a promise by the defendant to pay them that sum. A joint interest in the plaintiffs and a common right to relief is manifest beyond any decent pretense of misapprehension (*Code*, § 446).

But, if the meaning of the complaint be susceptible of misconstruction, that sense must be accepted which sustains the pleading (cases *supra*). Possibly the complaint was open to a motion to make it more definite and certain (*Code*, § 546); but it must stand against a demurrer, else the treacherous technicalities of common-law pleading are as prevalent as before the reformed procedure.

Demurrer overruled, with leave to answer on payment of costs.

---

## AGNES K. M. MULLIGAN *v.* LOUISE M. H. CANNON, AS EXECUTRIX, ETC., OF NEWTON CANNON, DECEASED.

SUPREME COURT, NEW YORK COUNTY, MAY, 1896.

§ 2718.

*Reference of claim against decedent's estate—plaintiff entitled to disbursements, though not to costs.*

In a proceeding to acquire title to real property an expert employed by the attorney for the owner of the property to testify as to its value must look to the owner for her compensation, and cannot hold the attorney of whose agency she was aware.

On reference of a claim against a decedent's estate, the plaintiff, if successful, is entitled to recover the fees of the referee and wit-

nesses and other necessary disbursements, but where the claim has not been unreasonably resisted or neglected by the defendant, cannot recover costs.

(*Decided May*, 1896.)

Reference of a claim, against a decedent's estate under section 2718 of the Code.

*Mortimer C. Addoms*, for plaintiff.

*Ernest Hall*, for defendant.

JAMES W. HAWES, Referee.—This is a reference under section 2718 of the Code of Civil Procedure. It is not disputed that in 1892 a proceeding was pending in this Court entitled "In the matter of Acquiring Title to Tremont Avenue, from Aqueduct Avenue to Boston Road, in the Twenty-fourth Ward of the City of New York;" that, a preliminary report having been made, Thomas S. Bassford, Esq., an attorney of this Court, was retained by Newton Cannon, then living, who was the owner of certain premises affected by the proceeding, and was dissatisfied with the amonnt awarded him, to appear therein and endeavor to secure an increase of the award; that said Bassford employed the plaintiff, then Agnes K. Murphy, a real estate agent and expert, to give expert testimony as to the value of the land taken in said proceeding belonging to said Cannon, and that on or about the 7th day of April, 1892, she appeared before the commissioners and gave such testimony upon the examintion of said Bassford, and that said Cannon was present upon the occasion and gave testimony in his own behalf. Nor is there any dispute that the reasonable value of the services so rendered is $100; nor that, at the time of her employment, the plaintiff knew that said Bassford was the attorney in said proceeding of said Newton Cannon.

The only defense urged upon the submission of the

case is, that Mr. Bassford was employed by Cannon under a special retainer, by the terms of which the attorney was responsible for all disbursements, and that, at the time of her employment, the plaintiff had notice of that fact. It is a well-settled rule of the common law that where one person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible. The rule is directly applicable to the case of attorney and client. The attorney cannot be held personally liable unless upon an express promise to that effect, proof of circumstances from which such promise may be justly inferred, or notice to the third party of lack of authority in the attorney (Judson *v.* Gray, 11 *N. Y.* 408; Bonynge *v.* Field, 81 *N. Y.* 159; Cavell *v.* Hart, 14 *Hun*, 252; Packard *v.* Stephani, 85 *Hun*, 197).

There can be no doubt of the authority of an attorney, in the conduct and management of his client's case, to make such necessary and proper disbursements as the case shall require. This authority is implied merely from the relation between attorney and client, from which a request on the part of the latter would be presumed (Foland *v.* Dayton, 20 *W. Dig.* 59; Harry *v.* Hilton, 11 *Daly*, 232; Palen *v.* Starr, 7 *Hun*, 422; Moulton *v.* Bowker, 115 *Mass.* 37; Weisse *v.* New Orleans, 10 *La. Ann.* 46; Williamson-Stewart Paper Co. *v.* Bobyshell, 14 *Mo. App.* 534; Packard *v.* Stephani, *supra*). The cases cited cover the fees of referees, stenographers and expert witnesses, the services of a bookkeeper in examining partnership books, the printing of briefs, though not required by rule of Court, and similar disbursements.

There can be no doubt of the authority of an attorney in a proceeding relating to the value of real estate to bind his client by the employment of a witness expert in such values. "In all cases where the principals seek exemption upon the ground that the credit was exclusively given to

their agent this should clearly appear, and they have the affirmative to show it, the natural presumption being, in all cases, that credit is given to the principal rather than to the agent. It is sufficient to say upon this branch of the case that there is no conclusive evidence that the credit was given by the vendors exclusively to the agent, and that they intended to look to him solely for their pay. It is true that upon the ledger and daybook of the vendors the articles were charged to Shall; and while this furnished strong evidence that they were furnished upon his credit, it does not show it conclusively" (Meeker *v.* Claghorn, 44 *N. Y.* 349, 352). To the same effect are Butler *v.* Evening Mail Ass'n (61 *N. Y.* 634, reversing 34 Superior Ct. 58), Foster *v.* Persch (68 *N. Y.* 400). "The plaintiff Thornton had the right to assume, unless in some manner advised to the contrary, that the attorney who employed him had the authority which his relation as such to his clients imported. And his right of action against them was not affected by any secret or confidential instructions given by them to him qualifying his actions" (Thornton *v.* Tuttle, 7 *St. R.* 801, 803).

It does not appear that there is any difference in the relation between attorney and client when acting in an ordinary suit and when acting in a statutory proceeding (People *v.* Coleman, 41 *Hun*, 307; Home Insurance Co. *v.* Smith, 28 *Hun*, 296; Gates *v.* De la Mare, 142 *N. Y.* 307). The plaintiff having been employed by Mr. Bassford, then he was, to her knowledge, acting as attorney for defendant's testator. The burden rested upon the defendant to show either an agreement by which the plaintiff restricted herself to the personal responsibility of Mr. Bassford, or notice to her of the limitation of his authority. I am unable to find that this burden has been discharged.

Upon all the proofs in this case I cannot find that the payment of the plaintiff's claim has been unreasonably resisted or neglected by the defendant, and therefore do

not award costs. The plaintiff, however, is entitled to recover the fees of the referee and witnesses, and other necessary disbursements (*Old Code*, section 317). While section 1 of chapter 245 of the Laws of 1880 repeals said section 317, subdivision 8 of section 3 of that chapter saves the right to disbursements (Larkins *v.* Maxon, 103 *N. Y.* 680; Krill *v.* Brownell, 40 *Hun*, 72). Chapter 686 of the Laws of 1893 repeals the provisions of the Revised Statutes referred to in said subdivision 8, but substantially re-enacts them in section 2718 of the Code of Civil Procedure. The last cited cases, therefore, continue authoritative.

When an act repeals and substantially re-enacts a statute, the re-enacted statute is a continuation of the former, and there in no suspension; and when one act is incorporated by reference in another the repeal of the earlier statute does not affect the situation, but the incorporated parts remain in force (*Endlich on Statutes*, secs. 490, 492; Flanders *v.* Town of Merrimack, 48 *Wis.* 567; Matter of Main Street, Sing Sing, 98 *N. Y.* 454). Section 32 of the Statutory Construction law, while not in terms applicable, may therefore be cited as declaratory of the existing law. This view of the right to disbursements is borne out by Outhouse *v.* Odell (84 *Hun*, 494).

## BARBARA ELLENSOHN, RESPONDENT, v. JOHN S. KEYES *et al.*, APPELLANTS.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE, 1896.

§§ 17, 971.

*Jury trial in equity suit—order granting it appealable—limit of time for making application.*

The rule of Court, requiring an application to frame issues to be tried by a jury, in a case in which the party is not entitled of right to such a trial, to be made within ten days after issue joined, is imperative, except where facts are shown to excuse neglect to apply in season.

An order granting a jury trial of issues in an equity suit is appealable.

A suit involving the professional conduct of an attorney is appropriately triable by a Judge without a jury.

The character of the issues framed in the case at bar criticised.

(*Decided June*, 1896.)

Appeal from order settling issues to be tried before a jury.

*William B. Hornblower* and *Edward C. Perkins* (of counsel), for appellants.

*Isaac N. Miller*, for respondent.

INGRAHAM, J.—Sec. 971 of the Code contemplates two methods by which issues to be tried by a jury may be framed in an action where the party is not entitled as a matter of right to such a trial: one, where the application is made to the Court; and the other, where the Court at the trial of its own motion desires the verdict of a jury to assist it in determining some question of fact at issue.

Where the application is made by a party to have issues framed, rule 31 of the General Rules of Practice provides that notice of that application must be made within ten days after issue joined. The object of this rule is apparent. It is to prevent, upon the eve of the trial, where the parties have prepared for trial at Special Term, an application to frame issues to be tried by a jury, thereby causing the delay and additional expense incident to such a trial.

Where a party has allowed more than ten days to elapse before giving notice of the application, the Court undoubtedly has power, upon proper facts, to open the default, and allow the application to be made; but facts must be shown to excuse the neglect to apply within the time prescribed by the rule.

By sec. 17 of the Code, the General Rules of Practice are made binding upon all the Courts of the State, and all Judges and Justices thereof, except the Court for the trial of Impeachments and the Court of Appeals; and the rules made as provided for by this section have the force of a statute and are binding upon the Court below.

This motion was made on March 7, 1896, and the moving affidavits show that issue was joined in the action on January 3, 1896; thus much more than ten days elapsed from the time that issue was joined and the service of the notice of the application.

Rule 31 of the General Rules of Practice was called to the attention of the Court by the affidavit in opposition to the motion, and the Court proceeded to grant the motion without a suggestion of any reason why it had not been made in time, and without the slightest excuse for the delay or ground for opening the default. For this reason, if for no other, we think the order was improperly made.

There can be no doubt but that this order is appealable to the Appellate Division. While it is true that the application was addressed to the discretion of the Court, still it

was to the Supreme Court, and the Appellate Division is as much a part of the Supreme Court as the Special Term at which the application was made.

Much confusion has arisen because of the attempt to apply decisions of the Court of Appeals as to the appealability of orders to that Court, to the question of the power of the Appellate Division to review orders of the Special Term, and cases which discuss the appealability of orders to the Court of Appeals have no relation to the power of this Court to review the orders of the Supreme Court. General power is given to the Appellate Division by section 1347 of the Code to review all orders of the Special and Trial Term of the Supreme Court where they affect a substantial right. We think the method of trial in an action affects a substantial right and that the order is clearly appealable. But upon the merits of this application we think no reason was shown to the Court below that would justify the Court in directing that any or all of these issues framed should be tried by a jury. The action is brought by the plaintiff as one of the next of kin or heirs at law of Antoine Ruppaner, deceased, to have a certain judgment entered in an action under sec. 2653a of the Code of Civil Procedure, whereby the validity of the last will and testament of the said Ruppaner was established and which it was alleged was procured collusively and in fraud of the plaintiff's rights, vacated and cancelled of record as to this plaintiff. The complaint alleges that such action was brought on for trial in pursuance of an agreement between the then attorney for this plaintiff and the attorney for the executors of the deceased—that such action should be brought and should not be contested, in order to cut off the rights of this plaintiff, as the heir at law and next of kin of the said decedent, to contest the validity of the said will; that under such an agreement the said action came on for trial on the 20th day of April, 1898, and in such action a verdict was recovered without any opposi-

tion on the part of the plaintiff's attorney, and that judgment upon such verdict was subsequently entered with the Clerk of the City and County of New York. We think that this was eminently an action to be tried by the Court rather than by a jury.

Attorneys at law are officers of the Court, and the proper performance of their duty to their clients is always watched with jealous care by the Court. Whether or not stipulations made by such attorneys as to the conduct of litigations before the Court are proper and within the power of the attorneys to make, are made in good faith and for the protection of the client, is peculiarly a question that the Court is able satisfactorily to determine; and to submit such a question to the jury would often subject the party to an action who had relied upon the judgment of the Court based upon such consents, and whose rights have been adjudicated by such judgment, to great injustice.

There is no suggestion or any reason why a trial by a jury is necessary, except that the plaintiff's attorney says that in his judgment the issues of fact should be tried by a jury. It is only necessary to say that our judgment is not in accordance with that of the attorneys of the plaintiff.

It is proper that we should call attention to the issues as framed in this case, to emphatically condemn the practice of submitting such issues to a jury in any case. The Court has settled twenty-two issues. The most of them are entirely immaterial in the determination of any question at issue in the case, and those which are material would be simply evidential facts which, if found in favor of the plaintiff, could only be considered upon the one main question at issue. Many of the issues are so framed as to make it almost impossible for a jury to intelligently pass upon them; and in general they are misleading and improper and could not fail to produce upon the trial great confusion. The answers of the jury to these questions, or

most of them, would aid the Court very little in the final judgment to be entered.

The order appealed from should therefore be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

All concur.

---

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF JAMES T. HORN, AS TRUSTEE OF THE TRUST CREATED BY THE WILL OF BENJAMIN T. HORN, DECEASED.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE, 1896.

§§ 2600, 2601, 2743, 2812.

*Surrogate's power to detain share of beneficiaries—liability of surety released under § 2600 of the Code—§§ 2743 and 2812, Code of Civil Procedure construed.*

A surety on an official bond released under sections 2600 and 2601 of the Code of Civil Procedure is liable only for a breach proven to have occurred during the actual period of his suretyship.

Section 2743 of Code is mandatory, and when an account shows a fund ready for distribution, the Surrogate must direct payment. The qualified power to retain temporarily under section 2812 must be based on a claim of title to a distributive share or a lien upon it.

(*Decided June*, 1896.)

Appeals from decree of Surrogate settling trustee's account and directing distribution.

*Robert J. Mahon*, for appellant.

*Gilbert W. Minor*, for respondent.

PATTERSON, J.—The Surrogate of New York County made a decree in this matter settling an account of James T. Horn, a substituted testamentary trustee. It declared that the account "is judicially settled and allowed as filed and adjusted." It directed that one-fifth of the amount in the trustee's hands for distribution be paid to J. Albert Horn as his distributive share, another fifth to Mary C. James, as her distributive share, one-tenth to the guardian of Viola Hall, an infant, and another tenth to the guardian of Beatrice Horn, an infant, as their respective shares. It was also stated in the decree, in substance, that one other fifth under the will of the testator, Benjamin T. Horn, belonged to James T. Horn and the remaining fifth to Isabella M. Dewey, but it was held that these shares should not be paid over. It appeared in the proceeding upon the accounting that James T. Horn and Isabella M. Dewey were sureties upon a bond which had been given by one August Kohn, the immediate predecessor as trustee of James T. Horn. It further appeared that Kohn was appointed trustee on the 26th of May, 1887, and remained such until his death on April 3d, 1895, and that at the time of his death he was indebted to the trust in the amount of $39, 578, which amount it is claimed is *prima facie* shown to have been misappropriated by Kohn. James T. Horn remained upon the bond of Kohn as his surety from May 26th to September 8th, 1887, when he was released from liability on such bond for any future delinquency of the trustee, but Mrs. Dewey has continued to be a surety on Kohn's bond to the present time. When James T. Horn was released as surety, one Lewis Appell was substituted in his place. It is also shown in the proceeding that Kohn's estate is insolvent, and that by reason of his misappropriation there is an apparent loss of the estate of about $40,000. Appell's estate is also said to be insolv-

ent. The amount ready for distribution on the present accounting, minus deductions allowed, is about $25,000. In the decree made by the Surrogate in this proceeding is a provision as follows: "And it appearing to this Court that neither the said James T. Horn nor the said Isabella M. Dewey, as such sureties respectively, nor the estate of said Lewis Appell, the deceased surety, have made good the deficiency or loss of trust funds on the part of their principal, said August Kohn, deceased, nor reimbursed the estate for the amount thereof; that the actual amount for which each or all of said sureties may be liable by reason thereof is undetermined, and until such liability, if any, is fixed and determined, and such sums or amounts as they severally may be liable for shall be paid over and placed to the credit of the trust and added to the amount now in the hands of James T. Horn, as such trustee, the full amount of said trust fund applicable for distribution cannot be ascertained or determined, and that while such liability of said James T. Horn and Isabella M. Dewey remains as a claim in favor of said estate, unadjusted and undetermined, it is impossible to state as a matter of fact that the said James T. Horn and the said Isabella M. Dewey have any present right to any distributive part, share or interest in said trust fund; and, therefore, it is hereby further ordered that the said James T. Horn retain in his hands as such trustee as aforesaid, the share of said James T. Horn and Isabella M. Dewey, or her alleged assignee, George H. Winters, until such liability, if any, of said sureties shall be fixed and determined, and such sum or sums as they severally may be liable for shall be paid over and placed to the credit of said trust, and be added to the amount so remaining is his hands as such trustee, and until the further order of this Court in the premises."

James T. Horn and Isabella M. Dewey (whose share was assigned to George H. Winters) and George H. Winters filed exceptions to that part of the decree of the Sur-

rogate from which the foregoing extract has been taken; and the question raised, by their appeals in the first place, is as to the right and authority of the Surrogate to impound the shares of James T. Horn and Isabella M. Dewey, so that those specific shares may be subjected, if it becomes necessary in the future, to any judgment which may be recovered against the sureties on Kohn's bond. So far as James T. Horn is concerned, we do not see how in any aspect of the question his share can be made liable, He was surety for Kohn only for a period of about four months, that is to say, from the end of May to September, 1887. The condition of the bond upon which he was surety provided for the faithful discharge by August Kohn of the trust reposed in him as a successor trustee under the will of Benjamin T. Horn, and for his obedience to all lawful decrees and orders of the Surrogate of the County of New York touching the administration of the estate committed to him. There is nothing whatever in the proofs before the Surrogate which indicates in any way that intermediate the date of the bond upon which James T. Horn became surety and the date of the order by which he was discharged as surety and another person substituted in his place, there was any act of infidelity of Kohn to his trust committed, or that there was any decree or order of the Surrogate's Court made directing Kohn to do anything, or that there has been any breach whatever of the condition of the bond. All that is shown is that within that period of time Kohn received assets of the trust, but there is nothing whatever to indicate that he did not have those assets in his possession intact on the day that James T. Horn was released from his suretyship, and when he was thus released his relation to the subject terminated: there was no longer any obligation of his outstanding except for delinquencies of the trustee shown to have taken place while his bond was current and operative. We are, therefore, of the opinion that so far as his share is con-

cerned, at all events, there was no justification for the order which the Surrogate made obstructing his right to the immediate possession and use of that share. But further than this, we are of the opinion that there was no power in the Surrogate's Court to make that provision of the decree which puts a restraint upon the distribution of any of the shares until an action may be framed, tried and determined as to the liability of the sureties upon Kohn's bond. The Surrogate's Court has no jurisdiction to try claims, but it has a qualified power on the settlement of the accounts of a testamentary trustee to retain possession of distributive shares until the Courts having jurisdiction may determine controversies respecting such shares. The provision of section 2743 of the Code with reference to the distribution of estates after the accounting of a trustee is a mandatory provision; it enacts that when the account is judicially settled and any part of the estate remains and is ready to be distributed, the decree *must* direct the payment and distribution thereof to the persons so entitled according to their respective rights. That portion of the estate of the testator accounted for in this proceeding was ready for distribution and is partially distributed by the terms of the decree; but as limiting the mandatory provision of section 2743, section 2812 of the Code of Civil Procedure provides that upon the judicial settlement of the account of the testamentary trustee, a controversy which arises respecting the right of a party to share in the money, or other personal property to be paid, distributed or delivered over, must be determined in the same manner as other controversies are determined, and if any such controversy remains undetermined when all other questions upon which distribution of the funds depends are disposed of, the decree must direct that a sum sufficient to satisfy the claim in controversy, or the proportion to which it is entitled, be retained in the hands of the accounting party or deposited in a Court depository subject to the Surrogate's

order. It is under the supposed authority or permission of this section 2812 that the provision of the Surrogate's decree appealed from was made. This section confers the only authority the Surrogate possesses with reference to the detention from the distributee of his share, and it expressly refers to the retention of the share in order that Courts of competent jurisdiction may determine the validity of claims or rights asserted against the money retained. That which must be the subject of the controversy within the meaning of section 2812 is the specific share of the money or the property detained—there must be a claim to or lien upon the share as such. It is not the meaning or proper interpretation of this section, that power is conferred upon the Surrogate to withhold from a distributee the share to which he is entitled until a question of his liability upon some instrument or obligation not affecting the right or title to that share may be determined. The beneficiaries of this trust do not possess any lien upon and have no claim or right to the shares of James T. Horn or Mrs. Dewey. There is, therefore, no controversy existing respecting the distribution of the shares. Neither of the sureties has been guilty of any wrong or any fraud which should deprive them of their shares, or which would require the application of those shares to make good any devastavit committed by them, or either of them; and they are only secondarily liable upon a sealed instrument to be enforced at common law by an action in which they are entitled to set up any defenses that may exist, and that they have such defenses is foreshadowed in the proofs. There is no general authority in the Surrogate to arrest their shares, and the facts shown in this record do not present a case of any dispute or controversy arising as to the ownership, title to, or right to receive the distributive shares of the appellants. If reasons exist which require the impounding the shares of James T. Horn and Mrs. Dewey, that object may be accomplished in a proper suit

in a proper tribunal, but it is not for the Surrogate, upon the theory of a general adjustment of possible equities, to exercise a jurisdiction which does not pertain to him and which can alone be exercised by a Court of equity.

The decree of the Surrogate should be reversed in so far as the provision we have considered is concerned, and the decree should be modified by directing that the amount found ready for distribution, minus charges and reserved fund, as stated in the decree, be paid over in accordance with the interests of the parties as settled by the decree, that is to say, one-fifth to James T. Horn; one-fifth to J. Albert Horn; one-fifth to Mrs. Dewey, or Winters, her assignee; one-fifth to Mary C. James; one-tenth to the guardian of Viola Horn, and one-tenth to the guardian of Beatrice Horn; or if no such guardians are appointed, that such tenths be deposited with the Chamberlain of the City of New York. Costs of these appeals and costs in the Surrogate's Court are allowed to the appellants, to be paid out of the fund.

RUMSEY, WILLIAMS and INGRAHAM, JJ., concur.
VAN BRUNT, P. J., concurs in result.

---

## *In re* DELONG.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§§ 1356, 1357.

*Stay granted pending appeal from order adjudging defendant guilty of contempt.*

A proceeding to punish for an alleged criminal contempt originating in the violation of an order granted in a civil action is a civil special proceeding within the meaning of the Code of Civil Procedure (sections 1356, 1357), and an order therein finding the

party proceeded against guilty, and imposing a punishment, is reviewable upon appeal; an application therefore for a stay of proceedings pending an appeal from said order will be granted. (*Decided April*, 1896.)

Application for stay of proceedings pending an appeal from an order adjudging the applicant guilty of contempt.

*Stern & Rushmore*, for plaintiffs.

*Wetmore & Jenner*, for Oscar A. DeLong.

LAWRENCE, J.—This is an application made on behalf of Oscar A. DeLong for a stay of proceedings pending an appeal from an order made at Special Term, adjudging him guilty of contempt in having violated the injunction contained in the decree in the action of Frank E. DeLong against The DeLong Hook & Eye Company. It is objected that the order is not appealable because it is not a final order. It was, however, held in The People *ex rel.* Negus *v.* Dwyer (90 *N. Y.* 402), that a proceeding to punish for an alleged criminal contempt, originating in the violation of an order granted in a civil action is a civil special proceeding within the meaning of the Code of Civil Procedure (sections 1356–7), and that an order therein finding the party proceeded against guilty, and imposing a punishment, is reviewable upon appeal. It would seem, from that decision, that the contention that the order in question is not appealable cannot be sustained. The order appealed from imposed a fine, and directed a reference to ascertain the loss and damage which the plaintiffs have sustained by reason of the misconduct of the appellant, together with the costs and expenses of the proceeding to punish him for contempt, and that the referee should report the proof taken by him to the Court, together with his opinion thereon, and that on the coming in and confirmation of said report the amount of the plaintiffs' damage, and their costs and expenses, should

be fixed and determined by the Court. The order further provided that the said DeLong should be fined the said sum of money so fixed and determined, as and for damages and costs aforesaid for his misconduct, and that he pay the same to the plaintiffs and stand committted to the jail for the City and County of New York until the said fine shall be paid. I think the defendant should be allowed a reasonable stay in which to prosecute his appeal, and shall therefore direct, if he will stipulate positively to argue the appeal at the May term of the Appellate Division, that such a stay be granted. Settle order on one day's notice.

---

## JAMES CREMINS *v.* EAST LAKE WOOLEN CO.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§ 1780.

*Attachment—affidavit setting up jurisdictional facts cannot be filed nunc pro tunc.*

Where an attachment has been granted against a foreign corporation and the affidavits upon which it was granted did not show either that the plaintiff was a resident of the State or that the cause of action accrued within the State, and said attachment was set aside for want of jurisdiction on motion of a subsequent lienor, a motion for leave to file an additional affidavit *nunc pro tunc* setting forth the residence of the plaintiff will not be granted.

(*Decided April*, 1896.)

Motion for leave to file an affidavit *nunc pro tunc* in support of an attachment previously granted and set aside.

*J. Edward Ackley*, for plaintiff and motion.

*Blumenstiel & Hirsch*, opposed.

LAWRENCE, J.—This is a motion made on behalf of the plaintiff for leave to file an affidavit *nunc pro tunc* showing that the plaintiff was a resident of this State at the time the attachment issued herein was granted. It appears that the attachment was granted against a foreign corporation, and that the affidavits upon which it was granted did not show that the plaintiff was either a resident of the State, or that the cause of action accrued within the State. Under such circumstances it would appear that the Court had no jurisdiction (*Code of Civ. Pro.* sec. 1780; Ladenburg *v.* Com. Bank of Newfoundland, 87 *Hun*, 274; Adler *v.* The Order, etc., of Baltimore, 28 *Abb.* 233). It appears that a motion was made before Mr. Justice TRUAX on behalf of Aaron M. Klaw, a subsequent lienor, to vacate the attachment on the ground that the Court had acquired no jurisdiction, and that such motion was granted. The application before me is for leave to file an additional affidavit *nunc pro tunc* setting forth the residence of the plaintiff in this State. The authorities up to this time have been uniform to the effect that such a motion could not be granted (see cases *supra*), and I do not find that the cases which are relied upon by the plaintiff in support of this motion are in point. The case of Sulzbacher *v.* Cawthra (reported 36 *N. Y. Supp.* 78), recently affirmed in the Court of Appeals, is not in point, for the reason that there all the jurisdictional facts necessary for the granting of the attachment appeared fully in the attachment papers, and the application was made not to vacate the attachment, but to reduce it to a certain amount, because it was plain that the affidavits were not complete enough to warrant the Court in granting the attachment for the amount for which it was granted. Here there is no attachment to amend, because it has already been vacated by the order of Mr. Justice TRUAX, and to grant it would be in effect to sustain an appeal from one Special Term judge to another. Ordered accordingly; $100 costs of motion. Settle order on notice.

THE PEOPLE *ex rel.* PHILIP E. MILLER, RESPONDENT, *v.* FREDERICK W. WURSTER, COMMISSIONER OF THE FIRE DEPARTMENT OF THE CITY OF BROOKLYN, APPELLANT.

COURT OF APPEALS, JUNE, 1896.

§§ 2138.

*Certiorari—cause must be heard upon the writ and return.*

Under section 2138 of the Code of Civil Procedure, providing that in *certiorari* proceedings the cause "must be heard upon the writ and return, and the papers upon which the writ was granted," the Court is not at liberty to look beyond the return and consider the facts stated in the petition and accompanying papers, unless the return is an admission of those facts or an equivalent of an admission. The fact that the return is silent as to the allegations contained in the petition and accompanying papers will not justify the Court in assuming that such allegations are true.

(*Decided June*, 1896.)

Appeal from an order of the General Term of the Second Department, which reversed and annulled the action of the Commissioner of the Fire Department of the City of Brooklyn, in removing the relator from membership in the Fire Department.

The relator sets forth in his petition for a writ of *certiorari* his appointment in 1890 as a member of the Fire Department of the City of Brooklyn; that on the 8th day of January, 1895, the Commissioner of the Fire Department irregularly, illegally and without cause removed him from such department; that he was charged on January 3d, 1895, with having been intoxicated, and that he was found guilty upon said charge before the said commissioner, notwithstanding his plea of not guilty, and that the evidence fails to support the charge; that on December 30th, 1894, January 1st and January 3d, 1895, he was charged

with absence without leave from his company's quarters, and a trial being heard thereupon, he was found guilty; that at the hearing on said charges he admitted his absence at the times alleged, and stated to the commissioner that said absences were caused by reason of his sickness and his inability to perform duty at the times specified in said charges. The petition then goes on to narrate, at some length, that between the 30th day of December, 1894, and January 3d, 1895, and at the times when he was absent from quarters without leave, that he had been attacked by bodily pains and dizziness: that he had unsuccessfully endeavored to procure the attendance of the Fire Department surgeon; that he had informed the assistant foreman of his company of the refusal of the surgeon to examine or prescribe for him; that on January 3d, having partially recovered, he reported to his company's quarters and continued to discharge his duties until his dismissal. Accompanying the relator's petition was an affidavit by his wife, tending to corroborate the petition with respect to the facts alleged therein as to the relator's illness and failure to procure the attendance of the surgeon. The writ of *certiorari* recited the allegations contained in the relator's petition and commanded the respondent, the fire commissioner, to certify and return under his hand, "all the proceedings had touching the removal and dismissal of said Philip E. Miller from said Fire Department; the charges preferred against him on the 31st day of December, 1894, and January 1st and 3d, 1895, together with all the testimony taken at the hearing on said charges on the 8th day of January, 1895, and all statements made at said hearing by petitioner."

In obedience to the writ, the respondent made a return, which purported to contain all the proceedings and other matters specified in and required by the writ. The return was made up of the four specific charges of absence without leave, with specific copies of date and length of absence, and one charge of intoxication, with specifications of date

and circumstances. It contained the record of the hearing before the respondent, as commissioner, on January 8, 1895, and the sworn testimony taken at the trial; from which it appeared that the relator was examined at the hearing and, upon being interrogated as to how he pleaded to each of the charges, answered "guilty," except as to the charge of intoxication; as to which he pleaded "not guilty." No testimony by him appears in the record other than what has been stated. The foreman and assistant foreman testified before the commissioner, and their testimony went to prove the absences without leave of the relator; but the foreman testified that the relator was not, at the time when so charged, under the influence of liquor. The record then contains the statement that, "after hearing the above testimony, the commissioner adjudged Philip E. Miller guilty of being absent without leave from the proper authority, as charged, and pronounced the sentence that he be dismissed from the department, to take effect immediately. This sentence was pronounced in presence of the accused, who accepted the same and then left the room." An extract from the minutes of the Fire Department showing the past record of the relator was also appended to the return. At the end of the return the respondent certified as follows: "I certify that the above is a true copy of all the proceedings had before me concerning the dismissal of Philip E. Miller. F. W. Wurster, Commissioner."

*Joseph A. Burr*, for appellant.

*Edward F. O'Dwyer*, for respondent.

GRAY, J.—There does not appear to be any legal ground upon which the reversal by the General Term of the commissioner's action, in dismissing the relator, can rest when the return of the respondent to the writ is considered, and it is evident that the Court, in determining as it did, was

influenced by a consideration of the facts set forth in the relator's petition. When we refer to the opinion delivered at the General Term we find that such is the fact, and that the General Term Justices considered, because the return of the respondent was silent as to the allegations of the relator's position, that those allegations must be considered and taken as a correct and truthful statement of the facts. The opinion states that the facts constituting the cause of the relator's involuntary absences were fully set forth in the petition, and, influenced by that view of the case before them, the learned Justices deemed that the conviction of the relator was illegal and unjust. I think that there has been quite a misapprehension on the part of the General Term Justices as to the nature and scope of the hearing which is to be had upon the writ and the return thereto. Section 2138 of the Code Civil of Procedure provides that the cause "must be heard upon the writ and return, and the papers upon which the writ was granted." That, however, does not mean anything else than a specification of what the General Term must have before it at the time of the hearing and upon which it must base its decision. It does not mean that the Court is at liberty to look beyond the return and to consider the facts stated in the petition and accompanying papers; unless the return made by the respondent should be an admission of those facts, or the equivalent of an admission. The object of the writ of *certiorari* is that the Court shall have certified and returned to it the proceedings of the body, or officer, to whom the writ is directed, in order that it may consider the same and their regularity and legality, and thus determine as to whether the complaint made by the relator in respect thereto is borne out. If the return is defective, provision is made by section 2135 of the Code that a further return may be directed by the Court, and the relator would be at liberty, if the return was evasive, or not sufficiently full, to move the Court to compel a

further return (People *ex rel.* Press Pub. Co. *v.* Martin, 142 *N. Y.*, 228). In the case of People *ex rel.* Peck v. Commissioners, etc. (106 *N. Y.* 64), to which the relator's counsel refers, the petition of the relator set forth that his removal had been irregular and illegal, and the return made by the commissioners to the writ of *certiorari* issuing upon the petition showed a resolution which dismissed the relator. It was therefore very properly held in that case, as the return was a plain admission of a summary dismissal without trial or hearing, that the facts in the moving papers became important and should be considered. In this case, however, when the cause came on for hearing, upon the return to the writ of *certiorari*, the Court had before it a return by the commissioner, which was certified to be "a true copy of all the proceedings had before him concerning the dismissal of the relator." As in that return it nowhere appeared that any evidence was offered by the relator upon his trial to excuse himself for having been absent without leave upon the several occasions specified, and it did appear that he pleaded guilty to each charge, the return was in effect a denial of the allegations of the relator's petition. There was no apparent defect in the return. It was certified to contain all that had taken place at the trial, and the Court below was not at liberty to consider anything else than the return. The relator might have moved the Court to direct the commissioner to make a further return if he believed that any testimony had been suppressed, which would have related to the allegations of his writ: but he did not elect to take that course and, in all probability, in view of the explicit certificate by the commissioner, it would have been unavailing. If the return is false, the relator has his remedy by action against the commissioner as for a false return: but, as the case is presented, the Court below was bound, and we are bound here, to take the return as true (People *ex rel.* Press Pub. Co. *v.* Martin, *supra;* Beardsley *v.* Dolge, 143 *N. Y.* 160).

It follows from the views I have expressed that the order of the General Term should be reversed and that the proceedings and determination of the commissioner should be affirmed, with costs.

All concur.

---

## HENRY B. BARNES *v.* GEORGE MEYER *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§ 3253.

*Extra allowance in foreclosure cases—leasehold estate not "real property" within the meaning of section 3253 of the Code.*

The phrase "real property" in section 3253 of the Code of Civil Procedure does not include leasehold estates so as to bring an action for the foreclosure of a mortgage thereon within subdivision 1 of that section.

No allowance can be granted in a foreclosure case under section 3253, subdivision 2 of the Code, where no defense has been interposed in the action, as such fact must appear as a condition precedent to the right of the plaintiff to an allowance.

(*Decided April*, 1896.)

Motion for allowance in action to foreclose a mortgage upon a leasehold estate.

*Jay & Candler*, for plaintiff and motion.

LAWRENCE, J.—This action was brought for the foreclosure of a mortgage upon leasehold property; and, upon the presentation of the judgment of foreclosure and sale, application was made for an allowance. The defendants raised no objection to the judgment of foreclosure, but opposed the allowance on the ground that it was held by

the General Term of this Department, in the case of Huntington v. Moore (59 *Hun*, 351), that in an action brought for foreclosure of a mortgage upon a leasehold estate for twenty-one years with conditions for renewal, reserving a rent certain, an additional allowance of costs in a proper case can be made to the extent of five per cent. upon the amount involved; but that the phrase "real property" in section 3253 of the Code of Civil Procedure does not include leasehold estates so as to bring an action for the foreclosure of a mortgage thereon within subdivision 1 of that section. That subdivision limits the allowance in an action to foreclose a mortgage to a sum not exceeding 2½ per centum upon the sum due or claimed to be due upon the mortgage, nor the aggregate sum of $200. I had granted in this case an allowance of $200 in the first instance; and the matter comes before me upon a motion for a reargument. I am satisfied, under the case cited, that an allowance cannot be granted under subdivision 1 of section 3253 of the Code of Civil Procedure (see also Despard v. Churchill, 53 *N. Y.* 192). The question therefore remains whether an allowance of five per cent. can be granted under subdivision 2 of that section. The defendants' counsel claims that it cannot, for the reason that no defense has been interposed herein, and that such fact must appear as a precedent condition to the right of the plaintiff to an allowance. This position seems to be well taken; and, as the leasehold property has been held not to be within subdivision 1 of the section in question, and not to be real property, I am reluctantly obliged to decline the application for an allowance. Ordered accordingly.

## UNDERHILL *v.* UNDERHILL *et al.*

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, JUNE, 1896.

§ 1538.

*Action for partition—representatives of deceased ancestor need not be made parties.*

Section 1538 of the Code of Civil Procedure, providing that "in a partition action the executors or administrators and creditors of a deceased person who, if living, should be a party to said action, must be made parties defendant," applies only to the case of a deceased owner of an undivided share, and not to the common ancestor of the parties to the partition.

(*Decided June*, 1896.)

Appeal by defendants from an order of the Special Term, Westchester County, amending the summons and complaint, and bringing in additional parties defendant. Action by Aaron G. Underhill against J. Warren Underhill and others for partition of the real estate of Charles W. Underhill, deceased.

*Henry C. Griffin*, for appellants.

*William K. Van Meter*, for respondent.

PER CURIAM.—This is an action for partition. It was brought within three years after the issue of letters of administration upon the estate of the common ancestor, through whom all parties claimed title. Pending the action, it appears, by a final decree on the judicial settlement of the accounts of the administrator, that the personal assets were insufficient to pay the debts of the deceased, and thereupon the administrator filed a petition with the surrogate for the sale of the real estate sought to

be partitioned. The plaintiff then applied for an order amending the summons so as to bring in the administrator of the deceased and also all the general creditors of the estate. The application was granted at Special Term, and from such order this appeal is taken.

We are of opinion that the order of the Special Term was erroneous. The respondent seeks to support it under the provision of section 1538 of the Code:

"In a partition action, the executors or administrators and creditors of a deceased person who, if living, should be a party to said action, must be made parties defendant."

The appellants contend that this provision applies only to the case of a deceased owner of an undivided share. We think this is the correct view. The common ancestor can in no sense be a person "who, if living, should be made a party defendant to the action," because, if he were living, there could be no such action. This, also, seems to be the view of the legislature. By chapter 277, Laws 1896, to take effect September 1st, this section of the Code has been amended, and a provision inserted therein providing that, when the action shall be brought before the expiration of three years from the time letters shall have been issued upon the estate of the decedent from whom plaintiff's title is derived, the executors or administrators of the estate of said decedent shall be made parties defendant,—an amendment which would be unnecessary if the former provision of the Code covered the subject. In Palmer *v.* Palmer, 8 *App. Div.* 213, 38 *N. Y. Supp.* 195, we have decided substantially the same question as here involved adversely to the claim of the respondent.

The order appealed from should be reversed, and motion denied, with $10 costs and disbursements.

## SPAULDING *et al.* v. AMERICAN WOOD-BOARD CO.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MAY, 1896.

§§ 982–984, 986.

*Right to change of venue—when lost.*

The defendant in an action is not in a position to insist as a matter of right, that the place of trial shall be changed, when it has defaulted in serving its answer; even though the default has been opened or the answer received by consent of the parties after the expiration of the time to answer.

(*Decided May*, 1896.)

Appeal by defendant from an order of the Special Term, New York County, denying its motion for a change of venue.

*Ira Leo Bamberger*, for plaintiffs, respondents.

*Lewis C. Freeman*, for defendant, appellant.

PER CURIAM.—If there was power and discretion in the Special Term, then, upon the merits, we think it was properly exercised in denying the motion. It is insisted, however, that the defendant was entitled as of right to the order changing the place of trial. A fatal objection to this claim appears in the fact that it defaulted in serving its answer, and not having made the motion in time, as prescribed by the Code of Civil Procedure (sections 982–984, 986), the defendant was not in a position to insist, as a matter of right, that the place of trial should be changed. Vale *v.* Railroad, 12 *Civ. Proc. R.* 103; Taylor *v.* Smith (Sup.), 11 *N. Y. Supp.* 29.

We think the order was right, and should be affirmed, with $10 costs and disbursements.

## N. Y. LIFE INSURANCE & TRUST CO., AS TRUSTEES, ETC., v. CUTHBERT, IVES, *et al.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§ 974.

***Accounting—counterclaim interposed does not prevent a reference of the issues.***

**Where an action involves the examination of a long account the interposition of a counterclaim in such an action does not prevent its reference.**

**Rule 31 of the General Rules of Practice requires that a motion to frame issues and send them to a jury shall be made within ten days after the joining of issue, and where the intervening time is greater than ten days, the rule will be adhered to, and unless special reasons exist the motion denied.**

(*Decided April*, 1896.)

Motion by plaintiff for an order referring all the issues to a referee, and motion by defendant that issues arising upon the complaint and amended answer of defendant be framed for a trial by jury.

*Emmet & Robinson*, for plaintiff,

*Edward W. Crittenden*, and *Hoadly, Lauterbach & Johnson*, for defendants.

LAWRENCE J.—A motion is made on behalf of the plaintiff for an order referring all the issues in the above entitled action to a referee to hear and determine the same, and a motion is made on the part of the defendant Ives that issues arising upon the complaint and amended answer of said defendant be framed for a trial by jury. The action is an equitable one for an accounting, and all

the parties except the defendant Ives have consented to a reference. The defendant Ives refuses so to consent because she has interposed certain counterclaims which she contends are properly triable before a jury. The General Term of the Second Department, in the case of the Brooklyn & Rockaway Beach R. R. Co. *v.* Reid (21 *Hun*, 273), held that where the action involved the examination of a long account the interposition of a counterclaim in such an action does not prevent its reference; and the Court, in delivering the opinion in that case, say that section 974 of the Code of Civil Procedure is not designed to send a counterclaim made by the defendant to a jury, in an action which is referable, for the reason that the trial would involve the examination of a long account. Upon that authority, and other cases which might be cited, it would seem that the plaintiffs are entitled to a reference. The defendant Ives, however, has, as stated, made a motion for the framing of certain issues to be sent for trial by a jury. It is objected in the first place by the plaintiff, to this motion, that it is made too late. Rule 31 of the General Rules of Practice of this Court requires that a motion to frame issues and send them to a jury shall be made within ten days after the joining of issue. In this case it appears that the issue was joined more than a year ago. It seems to me that the objection under the rule is well taken; although, if special reasons exist, it might be within the power of the Court, notwithstanding the rule, to make an order for the framing of issues and the trial of those issues by a jury (McKellar *v.* Rogers, 9 *Civ. Pro. Rep.* 6). I do not discover any special reasons in this case for framing issues. The first issue proposed is, Did Mr. Wendell appoint the plaintiff trustee under the Lasack will? This is admitted by the defendants' answer, and the question whether the appointment of such trustee was legal or whether it contravenes any of the provisions of the laws of this State, is one of law which cannot properly be passed

upon by a jury. The second is as to neglecting to pay over rents to the defendant Ives. The third is as to suffering real estate to become dilapidated. The fourth is as to the conversion of $188,500 out of the rent. The fifth is as to neglect to take action. The plaintiff contends as to each of these issues, and all of them, that they are matters which come within the purview of the accounting which the plaintiff asks, and that each of them can be put in issue by objections to the account filed, which account relates to the rents of the Lasack real estate collected by the plaintiff, and to its management of such real estate while in its possession. Plaintiff's counsel cites the case of Cook *v.* Jenkins (79 *N. Y.* 575), which seems to me to be in point. The sixth issue proposed is as to the plaintiff's withholding its consent to the settlement of the estate of Lasack unless paid a large sum of money for giving such consent. This issue does not affect the right of the plaintiff to a reference, and, even if it should be proven by the defendant, it does not amount to a counterclaim, and, if found in favor of the defendant, would not throw any light upon the question whether the account of the plaintiff as presented is correct or incorrect. If the views above expressed are correct, it follows that the motion to refer the case should be granted, and the motion to frame issues should be denied, with costs to abide the event.

## MONOLITHIC DRAIN & CONDUIT CO. v. DEWSNAP.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§ 2463.

*Trust fund—interest of beneficiary cannot be reached in supplementary proceedings.*

The interest of a beneficiary in a trust fund, created by a person other than the debtor, cannot be reached in proceedings supplementary to execution, and a bill by a receiver in supplementary proceedings in the nature of a creditor's bill to subject the surplus of such a trust fund cannot be maintained.

(*Decided April*, 1896).

Motion by a receiver in supplementary proceedings for instructions and for an order allowing him to sell personal and real property alleged to have been discovered as belonging to the judgment debtor.

*Walter D. Edmonds*, for receiver and motion.

*John W. Brainsby*, opposed.

LAWRENCE, J.—This is a motion made by a receiver appointed in supplementary proceedings for instructions, and for an order allowing him to sell personal and real property alleged to have been discovered in the course of said supplementary proceedings belonging to the judgment debtor. The personal property consists of a Royal bicycle and certain equipments connected therewith, and a gold watch which was owned by said judgment debtor on the 10th day of December, 1895. The receiver states that he is informed and believes that more cash will be received for the above articles if sold at private sale than if put

up at public auction, with all the necessary incidental expenses of advertising, auctioneer's fees, etc., etc. I see no objection to making the order in regard to the personal property. In respect to the real property alleged to have been discovered during the course of the supplementary proceeding, a more difficult question arises. An examination of the judgment debtor disclosed that on the 10th day of December, 1895, the date when the order for the examination was served, the defendant was interested in certain real property under the 6th clause of the will of his father. The said will, in substance, provides that all the property of the testator is given to executors and trustees in trust, to hold the same for the benefit of the widow and children of the testator, and to pay over the income to them until the youngest shall die or arrive at the age of 25 years, and that upon the happening of either event, the executors are directed to set apart sufficient of the residuary estate to produce to the widow an income of $5,000 per annum, and to divide the remainder of the said residuary estate among his surviving children or their issue, the income of two of such parts to be paid to his two daughters during their natural lives, and that such executors pay or transfer one of such parts to each of his three sons, among whom is the judgment debtor. The real estate thus referred to in the will of the testator's father is situated at numbers 1, 3, 5 and 7 William Street, in the City of New York, and it appears that said property had not been sold at the time of the service of the order for the examination of the judgment debtor. It is claimed by the receiver that it thus appears that the judgment debtor became entitled, on the death of his father, to a vested interest in the residuary estate, real and personal, taking effect in possession and enjoyment when the youngest child shall die or attain the age of 25 years; that no estate intervenes between the determination of the trust estate now existing and the vesting in possession of said estate or

interest in the judgment debtor upon the death of the youngest child of the testator or his attaining the age of 25 years. It is claimed on the part of the judgment debtor that the real estate is held in trust for the benefit of the judgment debtor, the youngest child of the testator not having died nor having attained the age of 25 years, and that, therefore, under section 2463 of the Code of Civil Procedure, the Court is not authorized to direct the sale of the judgment debtor's interest therein. It was long ago held that the interest of a beneficiary in a trust fund, created by a person other than the debtor, could not be reached in proceedings supplementary to execution, and that a bill by a receiver in supplementary proceedings in the nature of a creditor's bill to subject the surplus of such a trust fund could not be maintained (see Campbell *v.* Foster, 35 *N. Y.* 361; Levy *v.* Bull, 47 *Hun*, 350). It is also claimed by the judgment debtor that his interest is not vested, but is contingent upon his surviving his brother or until he arrives at the age of 25 years. Conceding, however, that the title to the property is vested, then the judgment is a lien and can be enforced by execution. It cannot, therefore, be reached in these proceedings nor sold by a receiver in supplementary proceedings. In such a case it is the duty of the plaintiff in an action in which execution is issued to proceed to sell the real property and thus exhaust his remedy before resorting to supplementary proceedings (First National Bank of Canandaigua *v.* Martin, 47 *Hun*, 571, and cases cited; see also Bunn *v.* Daily 24, *Hun*, 526). Draw an order in accordance with these views and settle on one day's notice.

## GEORGE v. FITZPATRICK.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, APRIL, 1896.

§ 417, 418.

*Service of summons by publication—variation between dates of original and copy no ground for setting it aside.*

The date of a summons is not so material a part thereof as to require the court to set aside the service of such summons, on the ground of the variance between the date of the original and the copy. (*Decided April*, 1896.)

Motion to set aside a service of summons by publication, and the order directing the same.

*Peck & Field*, for plaintiff.

*Hedges & Erdman*, for defendant and motion.

LAWRENCE, J.—This is a motion to set aside a service by publication and the order directing the same. The summons seems to have been dated February 20th, 1896, and the publication was commenced February 26th, 1896, and the notice published therewith stated that it was published pursuant to an order dated February 11th, 1896, which was on a day prior to the date of the summons. I do not regard the date of the summons as so material a part thereof as to require the Court to set aside the service of such summons on the ground of the variance between the date of the original and the copy (Welde *v.* Henderson, 10 *Civ. Pro.* 214; Wallace *v.* Dimmick, 24 *Hun*, 635; Sears *v.* Sears, 9 *Civ. Pro.* 432; see, also, sections 417 and 418 of the *Code of Civ. Pro.*). There is no doubt about the fact

that the summons in this case was served pursuant to an order of the Court duly made, and in the copy served the defendant was informed of the fact that the complaint npon which it was based was filed in the office of the Clerk of the City and County of New York. The defendant, therefore, could not be prejudiced by an erroneous date, because she could have inspected the original summons, which was on file for her examination and inspection. Even if material, the variance as to date between the summons filed and the summons published is a matter in regard to which the Court can exercise its power of amendment (*Code of Civ. Pro.* secs. 723, 724). As the order of publication was granted by Mr. Justice Beach, on affidavits which satisfied him that the defendant was either out of the State with intent to defraud her creditors, or kept herself concealed with like intent, to avoid the service of the summons, any error which may have been committed in granting that order can only be corrected upon appeal. I think that the Court has acquired jurisdiction in this case, and upon the facts which appear in the affidavits, the defendant certainly does not stand in a position which entitles her to the indulgence or clemency of the Court.

The motion will be denied with costs.

# N. Y. SECURITY & TRUST CO. *v.* SARATOGA GAS & ELECTRIC LIGHT CO. *et al.*

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MAY 1896.

## § 1331.

*Undertaking on appeal from judgment of sale of real property—appellant must be in possession.*

Section 1331 of the Code of Civil Procedure, providing that on appeal from a judgment directing the sale of real property, an undertaking is sufficient to stay the execution of the judgment which is to the effect that appellant will not, while in possession of the property, commit or suffer to be committed any waste, and if the judgment is affirmed or the appeal dismissed, he will pay the value of the use and occupation of the propety, does not apply except to a case where the appellant is in possession, nor does it apply to those cases where the judgment directs the sale of both real and personal property.

(*Decided May*, 1896).

Appeal by defendants from an order of the Special Term, confirming the Referee's report of sale and directing a conveyance.

*Hornblower, Byrne & Taylor*, for plaintiff, respondent.

*Edward Winslow Paige*, for appellant Reynolds.

PARKER, P. J.—This action is brought to foreclose a mortgage executed by the Saratoga Gas & Electric Light Company upon its franchise and property, real, personal and mixed, whether then owned, or thereafter to be acquired or constructed, to secure the payment of $300,000 of its bonds. The plaintiff holds the mortgage as trustee for the bondholders, and the foreclosure is asked for upon

the ground that, default having been made in the payment of the interest, the whole of such bonds have become due and payable. A receiver was appointed, at the instance of the plaintiff, to take and manage the mortgaged property during the pendency of the litigation, and such receiver had possession of the same at the time the orders from which this appeal is taken were made. During the time of such possession he had, to some extent, continued the business in which the mortgagor was engaged. The mortgagor was insolvent, and the defendant, William V. Reynolds, had been appointed a receiver of its property in sequestration proceedings, and as such opposed the foreclosure of the mortgage. The judgment in such action, in substance, directs that all the property of the mortgagor, real, personal, and mixed, including easements, rights of way, fixtures, materials, supplies, machinery, plant franchises, contracts and choses in action, of which said receiver was directed to take possession, or which have heretofore belonged to such mortgagor, or which he may acquire or be possessed of up to the time of turning over possession of the premises to the purchaser, including especially any contracts that the mortgagor or the receiver may have for the public lighting of the village of Saratoga Springs, or any right of action in connection with the bids that the receiver has heretofore put in for further contracts, be sold as an entirety, at public auction, by a referee therein duly appointed. Such judgment was affirmed on appeal to the General Term. (34 *N. Y. Supp.* 890.) An appeal from such affirmance has been taken to the Court of Appeals by the defendants, Reynolds and the First National Bank of Saratoga Springs, and is now pending. Such appellants have executed, and had properly approved an undertaking containing the obligations required by the first clause of section 1331 of the Code, and the question presented to us by this appeal is whether such an undertaking was operative to stay the sale directed by such judgment.

We are of the opinion that the provisions of that section are not applicable to the case before us. The evident purpose of the section is to secure to the respondent, upon such an appeal, indemnity against loss by reason of being deprived of the use of the property during the delay caused by the appeal, and by reason of any waste that may be committed thereon during that period. The section seems to assume that if such losses are made up to him the respondent will be as fully secured as if he was allowed to realize the full value of the property by an immediate sale thereof. Grow *v.* Garlock, 29 *Hun*, 598, approved in Werner *v.* Tuch, 119 *N. Y.* 632; 23 *N. E.* 573. It would be an unreasonable and forced construction of the statute to presume that it intended to secure any less protection than is above stated. But in order to secure that protection the appellant must be in possession of the land ordered to be sold. He is not required to give security that no one will commit waste during the appeal, but the provision is that he will not commit any waste "while in possession of the property." The phrase, "while in possession of the property," evidently was intended to mean so long as he continued in the possession, or until he is forced by the final judgment and sale to surrender it. The statute is framed upon the assumption that he is in possession, and that he is the one from whom waste may be apprehended. Such a construction secures the protection which the statute evidently designed. But if a party not in possession—one, for instance, who has a mere lien by judgment upon the mortgaged premises—chooses to defend against a foreclosure, and to appeal from court to court, and may stay the sale by simply giving an undertaking that he will not commit any waste, no protection whatever is secured to the mortgagee. In short, unless the statute is construed to apply only to cases where the appellant is in possession, it utterly fails to give any security whatever against waste of the premises, and be-

comes an absurdity. Moreover, we think that the provisions of the section do not apply to those cases where the judgment directs the sale of both real and personal property. The provision of the statute is that if the judgment directs the sale of real property, or the delivery of the possession of real property, its execution may be stayed by giving an undertaking that will secure the respondent from loss by waste committed thereon, and also secure to him the value of its use and occupation during the pendency of the appeal. The security thus provided for is directed to the protection of the real property only, and a reasonable construction, therefore, is that it was intended to apply to those cases where real estate alone is the subject-matter affected by the judgment. Such a construction does not do violence to the phraseology of the section. A judgment directing the sale of real property is a mandate of the court, affecting one kind of property only. A judgment directing the sale of both real and personal property is of another kind, and may well be placed in a different category. And provisions which would render adequate security for a stay in the one case would be entirely inapplicable in the other. The construction for which the appellant's counsel contends, to-wit, that, whenever any provision in a judgment directs the sale of real estate, the execution of the entire judgment may be stayed by merely giving security that will protect against loss arising from a delay in the sale of such real estate, would, in very many cases, deprive the respondent of any security whatever, and work very grievous injury. Suppose the assets of a co-partnership, consisting of a very trifling amount of real estate, and a very large and valuable amount of personal property, is in the custody of a receiver, and is about to be distributed by a court of equity; can it be that under the provisions of this section the execution of a judgment directing the receiver to sell and dispose of all the assets in his hands can be stayed by

such an undertaking as is therein provided for? We think not. Very many other instances might be suggested in which the construction of the section for which appellant contends would manifestly be injurious and utterly inapplicable. In the case before us the judgment directs, not only the sale of the real estate, but of contracts made with the village of Saratoga Springs, both by the mortgagor and the receiver, also rights of action arising out of such contracts, and from bids for contracts made by him and debts due to the mortgagor and to the receiver; and, in short, not only is the real estate of the mortgagor directed to be sold, but the whole business now in operation and connected therewith. Evidently the undertaking provided for by this section furnishes no security whatever for loss liable to accrue from a postponement of the sale of such property. The purpose of the section is to secure to the respondent indemnity against loss sustained by the delay caused by the appeal. Its language is not so precise and explicit as to force the construction that it was intended to apply to cases where it would utterly fail to secure that indemnity. It cannot be supposed that such was its intention, and therefore it should not be so construed. The appellant, in a case like this, is not without a remedy. He may always apply to the Court for a stay, and the Court has always power to grant one, upon such terms as the equities of each particular case require. Genet *v.* Canal Co., 113 *N. Y.* 472; 21 *N. E.* 390. We conclude that the undertaking given did not stay the plaintiff's right to proceed with the sale as the judgment directed.

As to the claim that the property was sold for an inadequate price, the facts before us do not sustain it. There is no evidence as to what was the real value of the property sold. The affidavit of Reynolds, to which the appellant's counsel refers us as evidence on that subject, was made in January, 1894, and is to the effect that the net earnings of the mortgagor are $35,000 per year.

That might be true, and yet the property sold by the referee not exceed in value the price obtained. What those net earnings were derived from does not appear, and it evidently refers to a condition existing more than two years before the sale. And the statements of Mr. Taylor as to what the committee were willing to bid are not such evidence of value as should be required in order to vacate this sale. There is no evidence before us that any greater sum can be procured on another sale, no statement that any one has offered more, no direct statement whatever, by any one, of the actual value of the property sold, and on such facts we cannot say that the price procured was an inadequate one. The orders appealed from must be affirmed, with $10 costs and disbursements.

All concur.

---

## THE PEOPLE *v.* JACOB LEVY.

COURT OF GENERAL SESSIONS, NEW YORK COUNTY, APRIL, 1896.

§§ 2442, 3160.

*Supplementary proceedings—referee—judge of City Court has power to appoint.*

Under section 2442 of the Code of Civil Procedure, a judge of the City Court of New York has power to appoint a referee in proceedings supplementary to execution upon a judgment recovered in said court.

(*Decided April*, 1896.)

Demurrer to indictment for offering in evidence, upon an examination in supplementary proceedings, a forged book of accounts.

*John R. Fellows*, district attorney, for people.

*Blumenstiel & Hirsch*, for defendant.

GOFF, R.—Section 107 of the Penal Code provides that a person who authorizes or procures a book, or other instrument in writing, knowing the same to have been forged or fraudulently altered, to be offered in evidence upon any trial, hearing, inquiry, investigation or other proceeding, authorized by law, is guilty of a felony. Section 109 provides that a person who makes or prepares any false record, or instrument in writing, with intent to produce it in evidence upon any trial, hearing, investigation, inquiry or other proceeding, authorized by law, is guilty of a felony. Under these sections, an indictment was found against the defendant, charging that a judgment was recovered against him in the City Court of New York, and an execution issued thereon; that a Judge of said court issued an order in supplementary proceedings, requiring him to appear before a referee therein named; that he appeared before the referee, and that, on the hearing, he offered in evidence a forged and false book of accounts, which he had made and prepared with intent to produce it in evidence.

The defendant demurs to the indictment on the ground that the facts set forth do not constitute a crime. The first and principal contention of the defendant is that the City Court, or Judge thereof, did not have power to appoint a referee in supplementary proceedings, and that, consequently, the hearing or proceedings before the referee, in which the forged book of accounts was offered in evidence, was not authorized by law. By his demurrer the defendant refers it to the Court to pronounce whether, admitting the matters of fact alleged against him to be true, they do, in point of law, constitute him guilty of the crime charged. The statute is the only authority for the prosecution, and the indictment must sufficiently charge the

defendant with acts which clearly bring him within all the material words of the statute. It is essential that the acts charged against the defendant to be criminal must have been committed in a proceeding *authorized by law.*

Supplementary proceedings, and the power to appoint a referee therein, are statutory creations. Sackett *v.* Newton, 10 *How.* 561. The City Court and all its powers are also statutory creations. Therefore, if a Judge of the City Court had not authority given him by statute to appoint a referee in supplementary proceedings, the hearing before such referee was not a proceeding authorized by law. The City Court had its origin in a court created by the Laws of 1807, known as "The Justices' Court, in the City of New York." In 1813 it was made a court of record, for limited purposes, under the title of "The Justices' Court, in and for the City and County of New York." In 1819 its name was changed to the "Marine Court of the City of New York." In 1883 it was changed to the "City Court of New York." Prior to the acts hereinafter cited, all proceedings supplementary to execution, issuing out of the Marine Court, had to be taken in the Court of Common Pleas. Chapter 629 of the Laws of 1872 declared the Marine Court to be a court of record, and provided that all actions, proceedings and remedies should be had before the court, in the same manner of pleading and procedure as they were had in other courts of record. Chapter 545 of the Laws of 1874, section 7, provided that proceedings supplementary to execution, on judgments recovered in the Marine Court, should be had in said court in the same manner and with like effect as in other courts of record, and that all provisions of law relating to such proceedings should apply to said Marine Court as fully as they then applied to other courts of record. The provisions of law relating to supplementary proceedings then in force, and applicable to other courts of record, were section 292 of the Code of Procedure, which provided that a judgment creditor was en-

titled to an order "requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order," and section 300, which provided that "the Judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time." The acts of 1872 and 1874 were unequivocal declarations of the legislative intent to conform the pleadings and procedure in all actions, proceedings and remedies in the Marine Court to that of other courts of record, and to confer upon it the same power in supplementary proceedings—which are remedies—including the appointment of a referee, as was at that time possessed by the other courts of record. Holbrook *v.* Orgle, 49 *How.* 289.

Jurisdiction of a subject-matter having once been conferred upon a court of record must be presumed to continue until the contrary appears by the express repeal of the statute conferring jurisdiction. A court of record is presumed to act within its jurisdiction. Village of Mayville *v.* Wilcox, 61 *Hun*, 223. And repeal by implication is not favored by law, and is never allowed, except in cases where inconsistency and repugnancy are plain and unavoidable. People *v.* Deming, 1 *Hilt.* 271; Wallace *v.* Bassett, 41 *Barb.* 92.

It is contended by the learned counsel for the defendant that this act of 1874 was expressly repealed by subdivision 50 of section 1, chapter 245 of the Laws of 1880, and that, in consequence, the City Court was relegated to its condition before the act of 1874, without the power to appoint a referee in supplementary proceedings. If the act of 1874 was repealed by the act of 1880, and no law corresponding in terms substituted in its stead, the contention is correct. The repealing act of 1880 was not specially and exclusively directed to the repeal of the act of 1874. It was general

in its character, repealing parts of the Revised Statutes, the Code of Procedure and certain session laws. Its manifest purpose and intent were to prevent inconsistency or conflict by removing from the statute books laws which were rendered superfluous or obsolete by being incorporated or codified in the new revision of the statutes. A clear indication of this is found in the fact that the repealing act of 1880 took effect on the 1st day of September, 1880, and on the same day chapter seventeenth of the Code, relating to supplementary proceedings, went into effect.

The Code of Civil Procedure constitutes a portion of the new revision of the statutes (section 3344). Its first thirteen chapters went into effect on the 1st day of September, 1877. At that time the Marine (City) Court was a court of record, and had power, under the Laws of 1874, to appoint a referee in supplementary proceedings. Section 2 of the Code enumerates the Marine (City) Court as a court of record. Section 4 declares that "each of those (enumerated) courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act." Title 12, chapter 17, provides for and regulates supplementary proceedings. They are declared to be remedies (section 2432) and special proceedings (section 2433). They may be instituted before a judge of the court out of which the execution was issued (section 2434), and an order may be made requiring the person to be examined to appear before the judge or a designated referee (section 2442). This title is a codification of all the provisions of law then existing relating to supplementary proceedings, and applicable to the courts of record in general. The City Court was a court of record. The powers and jurisdiction then vested in it by law were preserved and continued. One of those vested powers was the right to appoint a referee in supplementary proceedings under the act of 1874 and section 300 of the Code of Pro-

cedure. Therefore, it inevitably follows that this vested power was perpetuated and included in section 2442 of the Code of Civil Procedure. Howe *v.* Welch, 11 *Civ. Pro. R.* 444.

The Code is a revision of the statutes. It is a system designed to embrace and harmonize the laws relative to the powers and attributes of, and the practice and proceedings in, the courts of the State. Subsequent legislation, covering the whole subject of former legislation, and plainly intended to furnish the only law upon the subject, is treated as a substitute for the earlier legislation. Heckman *v.* Pinkney, 81 *N. Y.* 211. When a revising statute covers the whole subject-matter of antecedent statutes plainly by legislative intent, it is to be deemed to contain the entire law on the subject, and virtually repeals the former enactments. Matter of N. Y. Institution, 121 *N. Y.* 234. The Code of Civil Procedure, perpetuating and incorporating in its provisions the power of a Judge of the City Court to appoint a referee, as derived from the act of 1874, became the only law upon the subject, and the repealing act of 1880 simply repealed in terms the act which was virtually repealed by the Code, and it in nowise affected the jurisdiction of a Judge of the court.

But the learned counsel for the defendant further contends that section 3160 of the Code expressly prohibited the City Court, or a Judge thereof, from appointing a referee in supplementary proceedings. This section provides that sections 438, 603, 611 to 619, inclusive, 636, 827, 1013 and 1015, do not apply to an action or special proceeding in the Marine (City) Court, or to any proceeding therein. The last two sections are the ones relied upon, and, in order to arrive at the true meaning of the exclusions contained in section 3160, as they affect the Marine (City) Court, it is necessary to examine them. Section 438 relates to publication of summons, and is made inapplicable because that whole subject is provided for,

with respect to this court, in section 3170. Sections 603 and 611 to 619, inclusive, relate to the granting of injunctions in actions in equity, and they are made inapplicable because the court did not, nor never did, have equitable jurisdiction. Section 636 relates to the warrant of attachment, but this is specially regulated, as affecting this court, by section 3109. Section 827 has no application to the inquiry, and sections 1013 and 1015 relate to compulsory references. The only cases in which this court was permitted to appoint a referee was under chapter 629 of the Laws of 1872, on consent of the parties to the action, which is preserved to the court by section 1011, and under chapter 479 of the Laws of 1875, of its own motion, without the consent of the parties, to determine a question of fact arising on a motion, which is also preserved to the court by section 3172. So that the exclusions may be divided into two classes, those relating to subjects of which the court never had jurisdiction, and those relating to subjects of which the court had jurisdiction, but which were provided for by other sections of the Code, adapted to its peculiar practice.

The Code did not detract, in any particular, from the power of the court to appoint a referee in any case where the power had previously existed, but it extended the power in the cases specified in sections 885, 1215, in harmony with the tendency of legislation, which has always been to increase and not to diminish the jurisdiction of this court. Section 1013 provides for the appointment of a referee in an action which requires the examination of a long account, or where the issues are triable by the court without a jury. Section 1015 provides for the appointment of a referee to take an account in an action, after interlocutory or final judgment, or to determine and report upon a question of fact arising, in any stage of the action, upon a motion or otherwise. A referee in supplementary proceedings is not appointed to examine an account, or to try the issues in an action, or to take an account after

judgment, or to determine a question of fact in the action. Neither of these sections applies to supplementary proceedings, and when the phrase "special proceedings" is used, in section 3160, it cannot be taken to mean supplementary proceedings, but a special proceeding which presents some of the features to which the provisions of those sections are applicable.

That it was not the intention of the Legislature by one part of an act to confer authority to appoint a referee, and by another part of the same act to take it away, is evidenced by the note of the revisers to chapter 20 (containing section 3160), wherein they state that the enactments of chapter 545 of the Laws of 1874 were revised in that title, and that the subjects for supplementary proceedings were separately treated in chapter 17 of the act. Where one section of a statute refers to another section of the same statute for inhibition of power, recourse must be had to the latter section to ascertain the precise limits and subjects of the inhibition. Neither the limits nor subjects of the inhibition contained in sections 1013, 1015, interfere or conflict with the power conferred by section 2442 upon a Judge of the City Court to appoint a referee in supplementary proceedings.

I am, therefore, of opinion that the hearing before the referee was a proceeding authorized by law. The other questions raised by the demurrer are properly matters of defense.

Demurrer disallowed and defendant directed to plead to the indictment.

## EDWARD BRENEN, PLAINTIFF, v. JAMES NORTH, DEFENDANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE, 1896.

§§ 1207, 1279, 1670.

*Premature filing of lis pendens—relief granted by judgment broader than the prayer of the complaint —service of summons by publication.*

The fact that the *lis pendens* in a suit to foreclose a mortgage was filed before the filing of the complaint does not constitute a fatal defect, where it does not appear that any right was acquired by anybody as against the property by incumbrance or lien, intermediate the beginning of the suit and the decree and sale thereunder.

A judgment in a suit to foreclose a mortgage granting relief broader than the prayer in the complaint concerning the barring of rights and claims of parties defendant is not void, but merely irregular and is amendable. (Naughton *v.* Vion, 91 *Hun*, 360, followed.)

Affidavits upon which an order for the service of a summons by publication was granted, *Held*, sufficient to confer jurisdiction. Also *Held*, that there was substantial and sufficient compliance with the requirements of law as to service of summons by publication where the name of the particular defendant so to be served was stated in the summons as published, although the names of other defendants were omitted.

(*Decided June*, 1896.)

Submission of controversy upon agreed facts.

*Abram L. Elkus*, for plaintiff.

*Charles L. Greenhall*, for defendant.

PATTERSON, J.—The controversy between the parties on this record is submitted upon an agreed state of facts pursuant to the provisions of section 1279 of the Code of

Civil Procedure. It arises out of an agreement in writing by which the plaintiff contracted to sell and convey to the defendant certain premises in the City of New York. The defendant declined to receive a conveyance upon the alleged ground that the plaintiff was unable to convey a marketable title, and the objections he urges will be considered in the order in which he has presented them.

The premises referred to in the contract belonged, in 1857, to one Luke Clark, who, on the 1st of May of that year, executed a mortgage upon the same to Harriet Thompson, which was subsequently transferred to Edward Brenen. In 1886, Clark and his wife conveyed the premises to Patrick Brodie, who, in the same year, conveyed them to Bridget Brodie. Bridget Brodie died intestate, leaving as her heirs at law a son Thomas (of whom nothing seemed to be known in 1886, whether he was alive or dead or whether he left a widow or children), a daughter Ellen Brodie (since deceased), a daughter Ann Brodie, and grandsons Patrick and Timothy MacDonald, children of Mary Brodie MacDonald, a deceased daughter. In October, 1885, Brenen, the holder of the mortgage made in 1857 by Luke Clark, began an action for the foreclosure and sale of the premises in question, making parties thereto all who were interested in the property, including those who were presumptively heirs at law of Thomas Brodie. Judgment of foreclosure and sale was rendered in that action in February, 1886. The notice of *lis pendens* therein was filed in the office of the Clerk of the City and County of New York on the 28th of October, 1885. The complaint was not filed until the 11th day of November, 1885, and this circumstance gives rise to the first objection taken by the defendant to the title. It is claimed that the requirements of section 1670 of the Code of Civil Procedure are imperative, and that in order to make a foreclosure judgment effectual the notice of *lis pendens* must be filed either at the same time that the complaint is filed, or at some

subsequent time before final judgment, and that the premature filing of the notice is a fatal defect in the proceeding. It does not appear that any right was acquired by anybody as against this property by incumbrance or lien intermediate the beginning of the suit and the decree and the sale thereunder. By the decree and the deed given under the sale the title of the owner of the equity of redemption and the claims of all other defendants were effectually divested and cut off, and there is no practical question raised respecting the title acquired by the purchaser at the sale. Had there been intervening incumbrances or liens a different question would be raised as was the case in Weeks *v.* Tomes (16 *Hun*, 349). We think therefore that this objection is untenable.

It further appears by the submitted statement that in the action of Brenen the prayer of the complaint was that the defendant Luke Clark and all persons claiming under him subsequent to the commencement of the action be barred and foreclosed of all right, claim, lien and equity of redemption of said premises. At the time the suit was begun Clark had no interest or estate in the premises, for they had been conveyed by him to the Brodies. The complaint did not pray for any relief barring any other of the defendants than Luke Clark and those claiming under him. It is now urged that, under the provisions of section 1207 of the Code of Civil Procedure, the judgment could be no broader than the demand for relief, as the other defendants did not answer in the suit. This defect in the complaint does not render the judgment of foreclosure and sale void. The precise question was considered in the case of Naughton *v.* Vion (91 *Hun*, 360), where it was held that the judgment in a foreclosure action where the relief was broader then the prayer concerning the barring and foreclosing of the rights and claims of parties defendant was not void, but merely irregular and could be amended. That authority disposes of that objection.

The summons in the action of Brenen against Clark was sought to be served on Thomas Brodie, whose whereabouts, if he were alive, were unknown, by publication, and it is claimed that the affidavits upon which the order of publication was granted were insufficient to give jurisdiction. Those affidavits were made by the attorney for the plaintiff in that foreclosure suit, and by Ellen Brodie, who was a sister of Thomas Brodie. The attorney swears that Thomas Brodie could not, after due diligence, be found in the State, and that the deponent had inquired from people who knew Thomas Brodie and he was informed that he left New York seven years ago and never returned to their knowledge. Ellen Brodie swore that Thomas Brodie had left New York seven years before the time she made her affidavit, that she had never heard from him, that diligent inquiries had been made as to his whereabouts and she was unable to get any information concerning him, and that, therefore, she believed he was not a resident of this State. The affidavits were sufficient to authorize the order of publication. There certainly was some evidence before the Court that Thomas Brodie could not be served within the jurisdiction. The statement of due diligence in the efforts to serve him, as was remarked in Kennedy against the N. Y. Life Ins. & Trust Company (101 *N. Y.* 489), is not necessarily an allegation of a conclusion of law, especially when considered in connection with the affidavit of the sister of Thomas Brodie, that her brother had left New York seven years previously, and she had never heard from him, and that she also had made diligent inquiry as to his whereabouts. The affidavit of the sister contains the statement that she was satisfied that her brother did not reside within the City and County of New York, and, as stated before, the reasons for this belief were given. In Carlton *v.* Carlton (23 *Hun*, 251), the affidavit for the publication of the summons stated that the defendant had not resided in the State of New York since March, 1877,

and there was a further allegation that the deponent is informed and believes that the defendant is a resident of San Francisco. That was held to be sufficient to give the Court jurisdiction, and we think in this case where the service is attacked collaterally there was enough contained in the affidavit of the sister showing that the man had left New York seven years previously and had never been heard from thereafter by members of his own family, to justify the Judge who made the order in determining that the defendant, Thomas Brodie, was not a resident of the State of New York and could not be found therein. It is further made to appear by the submitted statement, that when the summons was published pursuant to the order of publication against Thomas Brodie, the name of the first defendant Clark and the name of Thomas Brodie alone appeared as defendants, and as there were other defendants it is claimed that there was no proper publication. But there was a substantial compliance with the requirement of the law. The object of the summons was to give notice to the defendant Thomas Brodie that the action was pending against him; all that was necessary to give that notice was done, the name of the particular defendant summoned was given, the place at which his answer or notice of appearance must be served was mentioned in the publication. Whatever was requisite to put him upon inquiry was contained in the summons as printed and nothing more was necessary than that. A literal and exact copy was not required, if the whole of the summons specifically directed to him as a defendant and his name appearing therein as a defendant was published, as appears to have been the case here. It is unnecessary to consider the other questions raised on this submission. The effect of the strict foreclosure action becomes unimportant in view of what has been previously said upon the other objections.

We are of the opinion that the title offered by the plaintiff was marketable and free from such a doubt, and

that the defendant should be required to accept the deed tendered by the plaintiff conveying the premises under the contract, without costs, as they have been waived by the stipulation.

RUMSEY, WILLIAMS, and INGRAHAM, JJ., concur.

VAN BRUNT, P. J. (dissenting).—I dissent upon the question of costs. Costs are in the discretion of the Court, and this discretion cannot be taken away by stipulation of the parties.

Costs should be allowed to the plaintiff.

---

## DOLAN v. DAVIDSON.

SUPREME COURT, SPECIAL TERM, CHAUTAUQUA COUNTY, MARCH, 1896.

### § 410.

*Action on a check—when statute begins to run.*

Under section 410 of the Code of Civil Procedure, the time within which an action on a check must be commenced, must be computed from the time when the right to make the demand of payment was complete, that is, from the time of the delivery of the check.

If the holder of a check is entitled to a reasonable time to present the same before the statute of limitations commences to run thereon, *Held*, that a presentation after fourteen years is not within a reasonable time.

(*Decided March*, 1896.)

Motion by plaintiff for a new trial on the minutes after non-suit in action on a check made by defendant.

*W. L. Sessions*, for plaintiff.

*James I. Fowler*, for defendant.

LAUGHLIN, J.—This is an action by the payee against the drawer of a check which reads as follows:

"JAMESTOWN, N. Y., December 12, 1880.

"Chautauqua County National Bank, pay to the order of Mrs. FOX, or bearer, fifty dollars, on interest at six per cent. dollars; for value received.

"$50. JOHN DAVIDSON."

The check was not presented to the bank for payment until the month of January, 1895,—upward of fourteen years after its delivery to the plaintiff's intestate. Payment was then refused, on the ground that the defendant had no funds in the bank. The plaintiff then notified the defendant that the check had been presented, and payment refused. The bank upon which the check was drawn is solvent. The answer pleads payment and the statute of limitations of six years. Upon proving these facts, the plaintiff was non-suited upon the trial, and now moves for a new trial upon the minutes.

Section 382 of the Code of Civil Procedure provides that an action upon a contract, except a judgment or sealed instrument, must be commenced within six years. Section 410 provides that where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete, with certain exceptions, not applicable to this case. Prior to the enactment of section 410 of the Code, the general term of this department, in the case of Brush *v.* Barrett, 16 *Hun*, 409 (an action by the payee against the drawer of a check), had held that the statute of limitations had run against a check which was not presented for payment within six years after its delivery, and an opinion to the same effect was written by Judge Barker at special term. The Court of

Appeals affirmed that judgment upon a different ground (82 *N. Y.* 400), and observed that it was unnecessary to pass upon the point decided by the General and Special Terms. This was the latest exposition of the law at the time of the enactment of section 410 of the new Code. It is evident from the language of that section, as well as from Throop's note thereto, that it was not intended to change the law, but merely to clear away doubt, and compile it as it then existed, reducing it to a precise and accurate statement. Bronson *v.* Munson, 29 *Hun*, 60.

The check in question is presumed to represent an ordinary indebtedness on the part of the defendant to the plaintiff's intestate, then due and payable; but, under the rules of the law merchant, an action could not be brought against the drawer until after presentation of the check to the bank, and refusal by the latter to pay. The check did not constitute an assignment of any funds in the bank, if there were any at that time, as to which there is no evidence (Attorney General *v.* Continental Life Ins. Co., 74 *N. Y.* 327, 330); and the bank owed the payee of the check no obligation. The right existed in favor of the plaintiff's intestate to the payment by the maker of the $50 and interest immediately; but the demand of the payee and notice of non-acceptance were necessary for the convenience and benefit of the maker, and to relieve him of the cost and annoyance of a litigation, by affording him an opportunity to pay in case his depositary refused to accept the check. Smith *v.* Miller, 43 *N. Y.* 171–175; Bank *v.* Hughes, 17 Wend. 94–98; Knapp *v.* Green, 79 *Hun*, 264, 267; 29 *N. Y. Supp.* 350; Wibur *v.* Warren, 104 *N. Y.* 192; 10 *N. E.* 263.

I am of the opinion that the statute of limitations has run against this action, both under the ruling of the General Term in Brush *v.* Barrett, *supra*, on account of the failure of the plaintiff's intestate to present the check within six years, and also under section 410 of the Code,

which, I think, should be construed as requiring that the time within which the action must be commenced must be computed from the time when the right to make the demand was complete. The right to make the demand was complete upon the delivery of the check, and the holder of a check should not be permitted to postpone indefinitely the liability of the maker, by omitting to present the check for payment. When the statute of limitations would be a bar to an action on the indebtedness represented by the check, it should also bar an action on the check. Railroad Co. *v.* Collins, 3 *Lans.* 33; Bradford *v.* Fox, 38 *N. Y.* 289. The early ruling that, as between the drawer and payee of a check, the check must be presented within a reasonable time, or the drawer will be released to the extent of any damages he may have sustained, and that the burden is on the payee to show that the drawer has not sustained damages, was made before the enactment of the statute of limitations, and that phase of the question was not considered. Bank *v.* Hughes, 17 *Wend.* 94; Little *v.* Bank, 2 *Hill*, 425; Harker *v.* Anderson, 21 *Wend.* 382, 383; Smith *v.* Miller, 52 *N. Y.* 545–548; Murray *v.* Judah, 6 *Cow.* 490. If, however, the holder of a check is entitled to a reasonable time to present the same before the statute of limitations commences to run thereon, I think it must be held, as a matter of law, that a presentation after fourteen years is not within a reasonable time. White *v.* Southerland, 2 *Alb. Law J.* 50; Reizenstein *v.* Marquardt, 75 *Iowa*, 294; 39 *N. W.* 506; Herrick *v.* Woolverton, 41 *N. Y.* 581, 589; Palmer *v.* Palmer, 36 *Mich.* 487; Lyle *v.* Murray, 4 *Sandf.* 594, 595; Stafford *v.* Richardson, 15 *Wend.* 304–306. The motion for a new trial is denied, with costs.

Motion denied, with costs.

## PERRY v. PERRY.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY, MAY, 1896.

§ 1771.

*Divorce—care and custody of children—decree may be modified.*

Under section 1771 of the Code of Civil Procedure, as amended by chapter 891 of the Laws of 1895, empowering the Court on the application of either party, to annul, vary or modify provisions contained in a decree of divorce as to the care and custody of children. *Held*, that a decree of divorce on the ground of the wife's adultery may be modified so as to permit her to visit the children.

(*Decided May*, 1896.)

Action for divorce, motion by defendant to modify the decree in favor of plaintiff to the extent of allowing her to visit the children.

*William O. Campbell*, for plaintiff.

*Philip Carpenter*, for defendant.

PRYOR, J.—The petioner, against whom a divorce has been obtained on the ground of adultery, solicits the privilege of visiting her children, now in the custody of their paternal grandmother. They are of the age of four and five years; the younger a girl, the elder a boy. As the statute stood before 1895, a final decree of divorce was not susceptible of modification, and its directions as to the custody of children were unalterable. But in June of that year, by amendment of the Code, the court is empowered, on the application "of either party, to annul, vary or modify such direction." This change in the provisions of the law involves a change in its policy, im-

plying that, after a sentence of divorce, circumstances may require a different disposition of the offspring of the parties. Nay, more, the implication of the enactment is that the defeated spouse, from whom, by the decree, the children have been taken, may present a case which, in the discretion of the Court, would entitle him or her to their custody and control. No distinction is indicated between the claims of husband and wife, but "either party" may make application for the children. It is the settled law of this State that, in determining the custody of infants between father and mother, their welfare, and not the supposed rights of the parents, is the controlling principle. Nor, in the competition, does the father start with any superior title; for, whatever was the notion in former times and other jurisdictions, at this day and in this country the claim of the mother to her offspring is, at least, of equal potency. "By the law of nature, the father has no paramount right to the custody of his child. * * * All other things being equal, the mother is the most proper person to be intrusted with the care of a child of this tender age. The law of nature has given her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree." Mercein *v.* People, 25 *Wend.* 103, 106.

It is urged, however, that, by her adultery and marriage with the paramour, this mother is demonstrated an unfit companion of her children. If her sin were incapable of atonement and her life of reformation, the objection would be insuperable. But in the statute of 1879 (chapter 321) we have legislative recognition of the fact, familiar in human experience, that an erring spouse may return to the path of virtue, and recover the qualities requisite to the nurture of children.

Upon the proofs, the conclusion is clear that the petitioner has retrieved her character; that her conduct is now blameless; that her present life is the life of a chaste

and exemplary matron. It is not in the interest of society that a lapse from virtue should involve an irredeemable infamy, but, rather, that moral amendment should be encouraged by every inducement. Surely, the signal reformation shown by the petitioner deserves the reward of an occasional visit to her infant offspring. Perpetual banishment from their presence—an indelible mark of disgrace—tends to render her desperate of a good repute. Association with them will fortify and confirm her in the resolution for a better life. What harm can come to these children from an interview with this mother? Is it to be imagined that, even if wicked herself, she would seize the opportunity to debauch their artless innocence? But she is now of irreproachable conduct and conversation, and we may be sure that her influence over them will be exerted rather to divert them from the ways that led to her own ruin. The husband says he has persuaded the children that their mother is dead, and he objects to their being disabused of the deception. I should rather think it a kindness to them to be relieved of the sense of orphanage by the embraces and ministrations of a caressing mother. Indulgence of the filial instinct is not only a source of happiness, but is the spring as well of the finest social virtues,—obedience, love, sympathy, and reverence. Whether, therefore, we regard the interests of the children, the mother, or of society, it is equally evident that the petition should be granted.

Order to be settled on notice.

## PEOPLE *ex rel.* THE LAWYERS' SURETY CO. OF NEW YORK, RESPONDENT, *v.* D. EDGAR ANTHONY, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE, 1896.

§ 2285.

*Contempt—subrogation of surety upon bond of defaulting receiver to rights and remedies against him.*

Where a permanent receiver of an insurance corporation appointed in an action for dissolution had been removed, and, under the terms of his final accounting charged with a sum of money, which by order of the Court he was directed to turn over to his successor, and the surety of said permanent receiver had, under further order of the Court, paid to the succeeding receiver the amount in which the original receiver was in default and taken an assignment of all the rights and remedies of the succeeding receiver against the original receiver, so that the surety should be subrogated to the position of the succeeding receiver, *Held*, that the surety having paid the indebtedness of its principal and received an assignment of the decree, the form of subrogation was sufficient, although the language may not have expressed anything more than an intention to assign the rights of the succeeding receiver to the surety; that no personal demand by the succeeding receiver was necessary after the transfer by him to the surety; that a personal demand upon the original receiver, made by or in behalf of the surety, was sufficiently absolute to enable it to enforce contempt proceedings against him, although such demand in terms required payment within three days; that it was not necessary that interrogatories should be filed, as the offense charged was substantially admitted by failure to deny the material facts alleged; that there had been a lawful determination of the necessary facts to justify an order for commitment for contempt, as it was alleged and not denied that the original receiver has a sum of money in his hands which by order of the Court he was directed to pay and fails to pay over upon proper demand; that the commitment for contempt was not irregular because the Court did not expressly impose in the

form of a fine the payment of the indemnity which the surety was entitled to demand from the original receiver; that it was not an irregularity that the commitment specified no fixed duration of the imprisonment, as the misconduct proved consists in the omission to perform an act, which, in contemplation of law, it is yet in the power of the original receiver to perform (*Code*, section 2285).

*Held*, however, that it was error to adjudge that the original receiver should pay, in addition to the amount in which he was in default, a sum for costs and expenses arbitrarily fixed without evidence to show what the actual costs and expenses were.

(*Decided June*, 1896.)

Appeal from order adjudging the appellant to be in contempt, and from the commitment issued thereon.

*Maurice Meyer* (of counsel), for appellant.

*Carlisle Norwood* (of counsel), for respondent.

VAN BRUNT, P. J.—The National Mutual Insurance Company, a corporation organized, under the laws of the State of New York, being dissolved in an action brought for that purpose, the appellant was appointed permanent receiver thereof on the 10th day of May, 1894. He duly qualified and entered upon his duties as such receiver, and continued in office until he was removed by order of July 8th, 1895, under the terms of which his final accounting was directed to be had before a referee. Thereafter said referee duly filed his report, and on the 3d of January, 1896, an order was duly made and entered in said matter confirming said referee's report, and charging said appellant with the sum of $6,693.37 in cash belonging to the said National Mutual Insurance Company, which he had failed to turn over to Mr. Daniels, who had been appointed receiver, as the successor of the appellant. The said order directed the appellant to pay over at once said sum to Mr. Daniels, with interest, from November 27th, 1895. A demand having been made upon the Lawyers' Surety Com-

pany by Mr. Daniels, the present receiver, for the payment by said company as surety for said appellant of said sum of $6,693.37, with interest thereafter, and on or about the 10th of February, 1896, an order was duly entered in the aforesaid action, authorizing the said receiver to receive the payment of the said sum, with interest, as aforesaid, from the surety company, and upon receipt thereof to assign, transfer and set over to the said company all his rights and remedies against the appellant, so that said company should be subrogated to the rights and remedies of the said receiver. On the 17th of February, 1896, the Lawyers' Surety Company, as surety for the appellant, paid to Mr. Daniels, the present receiver of said insurance company, the said sum, with interest, and said receiver thereupon executed to the surety company an assignment of all his rights and remedies against the appellant for the payment of the said sum of $6,693.37, with interest. On the 2d of March, 1896, the surety company signed a demand upon the appellant for the payment of said sum, with interest, and by its attorney served the same upon the appellant, together with certified copies of the orders and papers upon which the demand was based. The appellant having failed to comply with this demand, an application was made for an order directing the issuance of a warrant of attachment as for contempt against the appellant for disobedience of said order of January 3d, 1896, in failing and neglecting to pay said sum, with interest, which order was duly granted, and upon the same day a warrant of attachment was issued against the appellant returnable forthwith. The Sheriff, having arrested the appellant under the said warrant, brought him before the Court, and on the 31st of March, 1896, after various adjournments, the matter came up for hearing. The appellant filed an affidavit in no way denyimg the facts hereinbefore stated, but alleging that he had taken an appeal from the order fixing the amount of his liability, and that

upon such appeal he verily believed that the order would be reversed entirely, or so modified as to reduce his liability many thousands of dollars. The affidavit then proceeds to allege that the appellant is not chargeable with the amount which he has been adjudged to pay, and expresses the desire to secure the surety company against any loss that they might sustain on his account, and asks that a stay of proceedings might be granted pending the appeal from the order on which this application is based, upon his giving security to hold himself amenable to any further order of the Court. The Court thereupon entered an order adjudging the appellant in contempt of Court in not having obeyed the order of January 3, 1896, which required the payment of said sum of $6,693.37, with interest, and that the misconduct of the appellant was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff therein to its actual loss and damage in said sum and interest, besides costs, amounting to the sum of $250, which the appellant was directed to pay. It was further ordered that the appellant be committed to the Sheriff to be retained in close custody until he should pay said sums, and that a warrant issue to execute this order. Thereupon a warrant of commitment was issued, and from the last named order and the said warrant this appeal is taken.

Various points are raised by the appellant upon the appeal. It is urged that as the relator was not a party to the action or proceeding in which the order was made, it could not invoke or continue the rights and remedies which had been given by said order to the receiver who was the successor of the appellant. It seems to us that this point is not well taken. It appears that the Lawyers' Surety Company was the surety of the appellant upon his bond; and that upon it being determined that he was in default, upon application to the Court it obtained an order authorizing the present receiver to receive the amount which the ap-

pellant ought to have paid and to make an assignment of all his rights under the order which fixed the amount of the appellant's liability to the surety company. The surety company made the payment to the receiver, and such receiver, in pursuance of the authority conferred upon him by the Court, assigned to the surety company all his claims under said order with the intention, as was stated, of subrogating the surety company in his place and stead in respect to said order. It is urged that because of the use of these words there was no subrogation, and that Mr. Daniels did not actually subrogate the surety company in his place and stead, but only stated that he intended by the assignment so to do. The surety company having, under the circumstances disclosed, paid the amount required to be paid by the appellant, and the decree being assigned to it upon the authority of the Court by its officer, succeeded necessarily to all the rights which the receiver had enjoyed and was entitled to pursue the same remedies as the receiver had for the enforcement of the decree.

It is further urged that no sufficient personal demand was ever made of the appellant by any one. This seems to be based upon the theory that the personal demand should be made by Mr. Daniels as receiver, even although by the order of the Court all his rights had been transferred to the surety company. As already stated, that company, being his successor by means of the said assignment, had a right to pursue all the remedies which the law provided for the enforcement of the order.

It is urged that the demand required payment within three days; and the fact that the surety company gave the appellant an opportunity to comply with the terms of the decree is used as an argument that no absolute demand was ever made. We do not see the force of this reasoning. A personal demand was made upon him, copies of all the papers were served upon him, and he was required to pay;

and the fact that the surety company gave him three days in which to make the payment certainly was not a waiver of the demand.

It is urged that as the appellant did not admit the offense charged, interrogatories should have been filed. Upon an examination of the affidavit of the appellant, we think it clearly appears that it does admit all the facts necessary to constitute the offense charged. He admits the entry of the order; he admits that it required him to pay money which he had not paid; and all the answer that he makes is that he has appealed from the order and hopes to reduce the amount, and asks for time. He nowhere denies the entry of the order or the facts claimed to be established by the order; and we do not think that it was the intention of the Code that interrogatories must be filed, unless the party makes an express admission upon the record. It is a rule of pleading in all civil actions and proceedings that a failure to deny is to be treated as an admission. When the appellant therefore made no denial whatever of any of the facts upon which the warrant of attachment was issued, there was no necessity for interrogatories. It appeared before the Court that the appellant was guilty of the contempt.

It is further urged that there was no lawful determination of any of the necessary facts to justify the order for commitment; and that there was no legal proof of actual loss or injury to any one. It seems to us where it appears that an order has been made that a receiver has a certain sum of money in his hands which he fails to pay over upon proper demand, actual loss and injury are sufficiently shown. It is difficult to see how any other or more competent evidence could be offered.

It is further urged that as the Court did not impose, in the form of a fine, the payment of the indemnity which the surety company was entitled to demand from the appellant, the order and commitment were irregular. This

question has been determined adversely to the contention of the appellant in the case of the People *v.* Grant (11 *St. Rep.* 559), where it was held that there was no particular magic in the word "fine," and that where it was the clear intention of the Court to impose the payment of the amount unjustly withheld by the person to be committed, it was sufficient to state that the moving party had been injured to this extent and to require the payment of the amount.

In regard to the fact that the commitment specifies no fixed duration of the imprisonment, which it is claimed upon the part of the appellant is an irregularity, as such imprisonment can only be for a reasonable time not exceeding six months, it seems to be sufficient to say that by section 2285 of the Code it is provided that where the misconduct proved consists in the omission to perform an act or duty which it is yet in the power of the person to perform, he shall be imprisoned only until he has performed it and paid the fine imposed: and that in such a case the order and the warrant of commitment must specify the act or duty to be performed and the sum to be paid. The order and warrant of attachment in the case at bar specified with sufficient clearness the act to be performed and directed the discharge of the appellant upon compliance with the order; and the act was one which, in a legal sense, it was in his power to perform. That as matter of fact he may be unable to pay over the trust fund because he has embezzled and squandered it, is immaterial. That kind of inability is not the lack of power to do the act directed to be done which the law contemplates. The order and warrant seem, therefore, to have complied with the provisions of the Code in respect to the duration of the imprisonment.

We think, however, that the Court, in the absence of proof and judicial determination thereon, had no power to adjudge that the costs and expenses were $250. There is

not a scintilla of evidence contained in this record to show what the costs and expenses were, and there was nothing upon which the Court could act. It was improper, therefore, for the Court to require the payment of this sum as costs and expenses. It was not imposed as a fine in addition to the loss and injury which was occasioned by the neglect of the appellant, but as an indemnity for disbursements incurred in respect to which there is no proof.

We think, therefore, that the order and commitment should be modified by striking therefrom the provision requiring the payment of the sum of $250 as costs and expenses; and that as so modified, the order and commitment should be affirmed, without costs to either party.

All concur.

---

## KEEGAN *et al.* v. SMITH *et al.*

## McMAHON *et al.* v. SAME.

CITY COURT OF NEW YORK, TRIAL TERM, JUNE, 1896.

§§ 2727, 2728, 2743.

*Accounting by administrator—sureties not bound unless cited—debt of administrator to decedent.*

An administrator by decree in a proper special proceeding must be charged in his account with a debt due by him to decedent in her lifetime, but, although such debt must be treated as money in his hands for the purpose of administration, it will not, for all purposes, stand on the same footing as if he had actually received so much money, nor is it a debt for which the sureties or his administrator's bond may be held liable.

Under section 2728 of the Code of Civil Procedure requiring the sureties on the bond of an administrator to be cited upon the

judicial settlement of his account, a decree rendered on said accounting is not binding upon the sureties unless they were cited.

(*Decided June*, 1896.)

Action against the sureties on an administrator's bond.

*Dennis McMahon*, for plaintiffs.

*Andrew M. Clute*, for defendants.

VAN WYCK, C. J.—These two actions were tried by consent upon the same proof, by the court, without a jury, and Smith alone appeared and defended. He is sued as a surety on the official bond of Michael Keegan, who was in February, 1893, appointed administrator of the estate of his sister Jane, who died unmarried in the previous month. Another of her brothers, James Keegan, under section 2727, Code, petitioned the surrogate to issue a citation to the administrator, who had failed to file an account, although more than eighteen months had elapsed since his appointment, to show cause why he should not be compelled to render his account, and have the same judicially settled; and the administrator was alone so cited, and thereafter he filed his account, in which he charged himself as having collected the money left by decedent in her savings bank, amounting in cash to $579.35, and credited himself with $390, as properly disbursed by him for undertaker's, funeral, and church services. The petitioner, by his attorneys, McMahon *et al.*, who are plaintiffs in one of these actions, filed objections to this account,—that the disbursements of $390 were excessive, and that the administrator had failed to charge himself in the account with a just debt due by him to the decedent in her lifetime. This account and the objections were referred by the surrogate to one Bradley, and one Bonynge, as stenographer, took notes of the minutes at the hearings before the referee.

The petitioner, by his attorneys, made proof before the referee that the decedent had obtained on October 5, 1888 (four years before her death), against the administrator, three judgments, aggregating $593.26, and, with interest, amounting to $821.53; that these judgments remained unsatisfied of record; that, during decedent's lifetime, her attorney had made ineffectual efforts to collect the same, or any part thereof; and that the same still remained wholly unpaid,—but did not make the slightest effort to prove that these judgments were collectible. So that the only issues tried on this reference were whether the item of disbursement of $390 was reasonable and proper, and whether the administrator was indebted to the estate upon these judgments recovered by decedent against him, in her lifetime; and the referee reported that he was so indebted, and that his disbursements should be reduced by two items, $19 and $46.63,—$65.63, which deducted from $390 left $324.37, as properly disbursed and credited to him in his account. The administrator had received in cash $579.35, from which deduct the $324.37 as allowed, and there will still be a cash balance in his hands of $254.98, to which add $821.23, which must be charged in his account as a debt due by him to the decedent in her lifetime, and his account will show a nominal balance of $1,076.51 in his hands. However, the liability of the sureties on the administrator's bond is entirely different as to these two items of $254.98 and $821.23. The action of James Keegan *et al.* is by four of the five next of kin of the decedent against Smith, as surety on the bond of the administrator, who is also the other next of kin, and is based upon the decree entered upon the referee's report, and which decree purports to be a final judicial settlement of the administrator's account, and decrees the final distribution of the decedent's entire estate, although no one was cited upon this special proceeding except the administrator, who is one of five of

decedent's next of kin, and no one appeared except him and the petitioner, another next of kin. The decree, after judicially settling the account by charging the administrator with the balance of cash of $579.35 and with $821.23, as "an indebtedness to the estate for judgments recovered by decedent against the administrator in her lifetime," and crediting him with the $324.37, directs a final distribution of the balance of $1,076.51 by the administrator as follows: First, to the referee, $75, and to the stenographer, $80.20; second, to McMahon *et al.*, attorneys for the petitioner and his brother Joseph, as costs and allowance, $121.99; third, to distribute the residue of said estate among James (the petitioner), Michael (the administrator), and Joseph Keegan, and Margaret and Edward Riggs, the next of kin of deceased. There is no specific direction as to how much is to be paid to each, or as to how much each is entitled to, or as to whether Margaret and Edward Riggs are children of a deceased sister, and only entitled to her share of James Keegan's estate. The sums directed to be paid to the referee, the stenographer, and petitioner's attorneys, amounting in aggregate to $277.19, exceeds by $22.21 the cash balance of $254.98 in the administrator's hands. These sums must be paid, if at all, before distribution to next of kin; and this would leave only $799.32 of the $821.53 charged as a debt due by administrator to decedent during her life, to be so distributed. The petitioner's attorneys obtained and filed with the county clerk a transcript showing a judgment perfected by the decree in favor of James and Joseph Keegan and Margaret and Edward Riggs (the plaintiffs in this action) and Michael Keegan against Michael Keegan, as administrator of Jane Keegan, deceased, for $799.32, and issued, under Code, § 2554, an execution thereon to the Sheriff against the administrator, to enforce the payment to plaintiffs of $639.20, or four-fifths of the total amount directed to be paid to next of kin; but it does not

appear whether plaintiff's shares amount to four-fifths or to three-fourths. This execution against the administrator was returned wholly unsatisfied; and the four next of kin (plaintiffs) bring this action, under Code, § 2607, against Smith, as surety on the administrator's bond.

It must be conceded that under 2 *Rev. St.* p. 84, § 13, an administrator, by decree in a proper special proceeding, must be charged in his account with a debt due by him to decedent in her lifetime; and, although such debt must be treated as money in his hands for the purpose of administration, it will not, for all purposes, stand on the same footing as if he had actually received so much money, and, if wholly unable to pay the money as directed by a decree, he will not be punished for contempt, as he could be if he had actually received the money from some other debtor. Baucus *v.* Stover, 89 *N. Y.* 1, in which it is said:

"Whether his sureties could be held for such debt as so much money actually received by him we are not now called upon to determine, and do not determine."

However, the Court of Appeals has since held that his sureties could not be held for such debt in the action in which the sureties were sued, and such action against them was dismissed. See Baucus *v.* Barr, 107 *N. Y.* 624; 13 *N. E.* 939, which affirmed same case in 45 *Hun*, 582, on the opinion of General Term, which says:

"The surrogate, following the decision of the Court of Appeals [Barcus *v.* Stover, 89 *N. Y.* 1], has ordered that the executor do apply and distribute the amount due upon the note as part of the personal estate of the testator. As he can do nothing of the kind, and legal remedies against him have proved unavailing, this action is brought against his sureties. The sureties are not liable, and judgment must pass in their favor."

In the case at bar it appears on the face of the decree that the next of kin (plaintiffs) can have resort only to the debt due by the administrator to decedent during her

lifetime, for payment of their distributive shares of her estate, and against that they have exhausted their remedy by execution returned unsatisfied, but may still pursue the administrator by supplementary proceedings. Moreover, such a decree as the one under which they issued execution, and now sue the surety, does not now bind the sureties on an administrator's official bond. It must be remembered that prior to September, 1893 (chapter 252, *Laws N. Y.* 1893, and chapter 421, *Laws N. Y.* 1894), it was not necessary for an executor or administrator who sought a judicial settlement of his account by decree, under sections 2728 and 2729 of the Code, to cite his sureties, although he was always required to cite next of kin, legatees, creditors, etc., and the decisions prior to that date adjudicating an estoppel against sureties by such decrees must be considered in view of the fact that sureties were not then necessary parties to the special proceeding in which such decrees were made. But now, upon a voluntary petition by an administrator for a judicial settlement of his account, his sureties must also be cited, under section 2728 of the Code. In these cases at bar, one of five next of kin petitioned, under section 2727, for a citation to issue to the administrator alone, who had failed to file an account, although eighteen months had elapsed since his appointment, to show cause why he should not be compelled to file his account, and have the same judicially settled; and this section provides that if, upon the return of such a citation, the administrator fails either to appear or to show good cause to the contrary, or to present, in a proper case, a petition, as prescribed in section 2728, an order must be made directing him to account within such a time and in such manner as the surrogate prescribes, and this section further provides:

"If it appears that there is a surplus, distributable to creditors or persons interested, the surrogate, at any time, may issue a supplemental citation, directed to the persons

who must be cited, on the petition of an executor or administrator for a judicial settlement of his account, and requiring them to attend the accounting."

This provision last quoted from section 2727 first appeared in Throop's Code of 1884, as the last sentence of section 2727, and his note thereto says:

"The last sentence is new. It appeared to be necessary because the former statute contained no provision for citing the persons entitled to the surplus, unless the executor or administrator voluntarily presented a petition for a settlement. It is manifestly improper that a distribution should be made without giving them an opportunity to be heard." *Dayt. Sur.* 451, 461.

And section 2728 provides that the sureties, etc., must be cited on a voluntary petition by the administrator for judicial settlement of his account. And section 2743 says:

"Where an account is judicially settled, as prescribed in this article [sections 2722–2748], and any part of the estate remains, and is ready to be distributed to the creditors, next of kin, etc., the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. If any person, who is a necessary party for that purpose, has not been cited, or has not appeared, a supplemental citation must be issued, as prescribed in section 2727 of this act."

No one was cited or appeared in the special proceedings before the surrogate in which the decree was entered directing a judicial settlement of the administrator's account, and directing a final distribution of decedent's entire estate, except the petitioner and the administrator, and possibly the brother Joseph; at most, only three of five next of kin. The remaining next of kin, the creditors, if any (no proof having been that there were none, or that they had been advertised for), and this surety, Smith, the defendant, are not bound by that decree. Browning v. Vanderhoven, 4 *Abb. N. Y.* 166. This was

an action by the attorney of a petitioning creditor upon the surrogate's decree awaiting him an allowance of $70 against the sureties on the administrator's bond; and Barrett, J., in directing judgment for defendants, with costs, and holding that the allowance by the surrogate was without jurisdiction, said:

"The question remains as to whether these sureties can take the objection. The object of the statute [*Laws* 1870, c. 359, § 1] appears to be to place the Surrogate's Court, in this matter of jurisdiction, upon the same plane as courts of general jurisdiction. Under this section, the remedy of the administrator was probably limited to an appeal. The sureties, however, were not parties to the record, and could take no appeal. It is doubtful whether they could move the surrogate, and, in case of his adherence to the original judgment, obtain a review by appeal from the denial of their motion. Be that as it may, the legislature never intended, as to the parties *dehors* the record, to overturn the general policy of the law, which allows the fullest inquiry into jurisdiction."

And see Schlegel v. Winckel, 2 Dem. Sur. 232, as to the necessity of a proper supplemental citation, under section 2727, before decreeing distribution on petition of a creditor.

The decree upon which both plaintiffs sue awarded the referee and stenographer $155.20, and the plaintiffs, McMahon *et al.*, the petitioner's attorneys, $121.99,—making $277.19, which would fully exhaust the cash balance of $254.98, the only available asset in the administrator's hands; and it is fair to assume that if the sureties and next of kin and creditors, if any, not cited, had appeared and objected, these allowances, if made, would have been much smaller; and, as they were not cited, they still have the right to have their objections heard.

The complaint in the action of Keegan *et al.*, the next of kin, plaintiffs, against Smith, as surety, defendant, is

dismissed, with costs and extra allowance of 5 per cent. on plaintiffs' claim to said defendant; and so, too, the complaint in the action of McMahon *et al.*, plaintiffs, against Smith, as surety, defendant, is dismissed, with costs and extra allowance of 5 per cent. on plaintiffs' claim to said defendant. An exception on behalf of the plaintiffs in both actions is noted to this decision, and a stay of execution is granted such plaintiffs of thirty days after notice of entry of judgments.

# INDEX.

PAGE

ABATE. Action against sheriff to enforce his liability as bail does not abate on the death of the sheriff..... 70

ACCOUNTING. On an accounting by a testamentary trustee under section 2780 of the Code, only necessary disbursements will be allowed..... 240

——Where an action involves the examination of a long account the interposition of a counterclaim in such an action does not prevent its reference..... 377

ACTION on promissory note for a money judgment; general assignee of makers permitted to intervene ..... 322

——under section 410 of the Code, the time within which an action on a check must be commenced, must be computed from the time when the right to make the demand of payment was complete, that is from the time of the delivery of the check..... 408

ADDITIONAL PARTIES. Code provisions for bringing in additional parties or substituting parties, who, *pendente lite*, have succeeded to the interest of the original party..... 122

AFFIDAVIT taken without the State; when not properly certified to entitle it to be used upon a motion..... 180

APPEAL. In ordinary criminal cases an appeal should not be maintained in opposition to the prosecuting authorities of the people..... 226

APPEALS from Appellate Term to Appellate Division..... 266

ARREST. Order of arrest in action of replevin; complaint must state specifically the value of the goods..... 230

ASSIGNMENT. Action to set aside assignment in aid of an attachment; creditors entitled to collect their claims out of property of non-resident debtors conveyed for purpose of defrauding creditors..... 294

ATTACHMENT. In order to confer jurisdiction upon the Court to grant a warrant of attachment, it must affirmatively appear not only that the defendants are non-residents of the City of New York, but that they have not an office within that city where they regularly transact business; and where the plaintiff simply alleges that the defendants are non-residents of the City of New York, this is not a sufficient compliance with the jurisdictional requirements, and therefore invalidates the attachment..... 251

PAGE

ATTACHMENT. Under Section 638 of the Code of Civil Procedure, providing that personal service of the summons must be made upon the defendant against whose property an attachment has been granted within thirty days after the granting thereof, or else before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor; failure to serve the summons without the State upon a non-resident till after the expiration of the thirty days does not affect the validity of the service, or the order authorizing it, but simply the validity of the attachment which the defendant thereupon is entitled to have vacated..... 280

——See Assignment..... 294

——under our Code is not an original process by which an action is commenced. It is a mere proceeding in an action..... 176

——Where a sheriff receives several attachments against the same debtor, it is his duty to satisfy them in the order in which they were received..... 197

——An application to vacate a warrant of attachment, when founded only on the papers upon which the warrant was granted, if the warrant was granted by a Judge out of Court, must be made to the same Judge, in Court or out of Court, and with or without notice, as he deems proper..... 202

——In applying for a warrant of attachment, a statement of two grounds, disjunctively and in the alternative, is a statement of neither ground, since to affirm one or the other proposition is to affirm neither; and in such a case the warrant will be vacated..... 202

——The sheriff is entitled to be paid his fees by the defendant before he can be called upon to surrender the property upon which the attachment was levied..... 235

——Against property provided for by section 635, subd. 3, Code of Civ. Pro., as amended in 1895, in actions for personal injuries, is limited to the probable amount of the recovery.... 102

——The practice in this respect should be assimilated to that followed in granting orders of arrest..... 102

——What constitutes a certified copy of a warrant of attachment..... 156

——Against foreign corporation. What is a sufficient service of the summons under section 638 of the Code. ..... 48

——Where an attachment has been granted against a foreign corporation and the affidavits upon which it was granted did not show either that the plaintiff was a resident of the State or that the cause of action accrued within the State; and said attachment was set aside for want of jurisdiction on motion of a subsequent lien or a motion for leave to file an

PAGE

additional affidavit *nunc pro tunc* setting forth the residence of the plaintiff will not be granted..... 365

ATTORNEY'S LIEN. The lien which the statutes give to an attorney upon his client's cause of action does not confer upon him a right to stand in the way of a settlement of an action which is desired by the parties and which does not prejudice any right of the attorney..... 327

BILL OF PARTICULARS forms no part of the pleadings..... 188

BOND. In an action brought upon a bond given to discharge a mechanic's lien, the lienor may sue as plaintiff in his own name, and no assignment of the bond to him is necessary to support the action..... 261

CERTIORARI. Where the relator fails to apply for a writ of *certiorari* until more than four months after the determination to be reviewed becomes final and binding, such four months limitation shall be an inseparable bar to the issuance of the writ..... 89

——Under section 2188 of the Code of Civil Procedure, providing that in *certiorari* proceedings the cause "must be heard upon the writ and return, and the papers upon which the writ was granted," the Court is not at liberty to look beyond the return and consider the facts stated in the petition and accompanying papers unless the return is an admission of those facts or an equivalent of an admission. The fact that the return is silent as to the allegations contained in the petition and accompanying papers will not justify the Court in assuming that such allegations are true..... 367

COMMITTEE OF PERSON and property, appointment of; notice need not be given to relatives, when the application for the appointment of committee is made by the husband or wife..... 196

COMPENSATION of referee on sale in foreclosure..... 100

CONTEMPT OF COURT. The knowingly interposing a false answer is not a contempt of Court for which a party may be punished in a civil proceeding..... 278

——The knowingly interposing a false answer is not a contempt of court for which a party may be punished in a civil proceeding..... 116

——A warrant of attachment, under which a person is held to answer for a contempt, need not recite the contempt or any of the proceedings upon which the warrant rests..... 141

——A proceeding to punish for an alleged criminal contempt originating in the violation of an order granted in a civil action is a civil special proceeding within the meaning of the Code of Civil Procedure (sections 1356, 1357) and an order therein finding the party proceeded against guilty, and imposing a punishment, is reviewable upon appeal; an appli-

PAGE

cation therefore for a stay of proceedings pending an appeal from said order will be granted..... 363

CO-PARTNERS. Suit against defendants as co-partners; co-partnership must be proved as alleged; one of the defendants not chargeable individually if the defendants joined as co-partners were not such in fact..... 254

CORPORATION. In an action by or against a corporation, it is not necessary to prove on the trial of the cause the existence of the corporation, unless the answer is verified and contains an affirmative allegation of its non-existence; and this rule applies where the defendant does not appear or plead..... 68

COSTS. On reference of a claim against a decedent's estate, the plaintiff, if successful, is entitled to recover the fees of the referee and witnesses and other necessary disbursements, but where the claim has not been unreasonably resisted or neglected by the defendant, cannot recover costs..... 348

COUNTERCLAIM. Where an action involves the examination of a long account, the interposition of a counterclaim in such an action does not prevent its reference..... 377

——Against the landlord personally may not be interposed in a summary proceeding brought by her in her capacity as guardian..... 106

——In an action to foreclose a mortgage, a motion made to strike off the cause for want of a reply to a counterclaim contained in the answer will be denied..... 143

CREDITORS. See Assignment..... 294

CREDITOR'S LIEN attaches only to debtor's share where partition of the property is made, but to the whole premises where a sale is made..... 228

DAMAGES. In an action brought by a father, as administrator, under the statute, to recover damages for the death of his infant child, caused by defendant's negligence, the jury, in determining the amount of damages to be awarded is in duty bound to consider the probable earnings of the child during minority over and above her support, clothing and education..... 249

DEBTS OF DECEDENT, payment of. Personal estate must be exhausted before recourse can be had to his real estate..... 301

——The debts of a decedent for payment of which his real estate may be sold, and which Code Civil Procedure, section 2756, provides shall not include costs of a judgment against his executor or administrator, do not include costs of an action against the surviving partner of decedent..... 316

DECEDENT'S ESTATE. See Costs..... 348

DEFAULT. The fact that a District Court Justice cannot open a default taken in summary proceedings does not imply that

PAGE

a court of equity must for that reason supply the absence of the jurisdiction by the assertion of its authority..... 93

DEFAULT. Section 724 of the Code declaring the power of the Courts to open defaults within one year, applies only to Courts of record..... 257

——Origin and extent of power to open defaults..... 257

——By his default, the defendant admits only the facts properly pleaded, not that the plaintiff is entitled to the relief demanded, or the extent of that relief..... 1

DEMURRER. If the interest of plaintiffs in a cause of action be obviously joint, upon demurrer it will not be deemed several because not characterized in terms as joint..... 347

DESIGNATION of defendant whose Christian name is unknown; validity of judgment..... 247

——The purchaser at the foreclosure sale, before taking the title, however, has a right to demand that the requisite amendment be made, so as to sufficiently designate the defendant intended..... 247

DISTRICT COURTS, power to open defaults. See Defaults.... 257

ENTRY of judgment waives right to appeal from judgment.... 144

EXAMINATION. Power of Court to extend time to answer until non-resident plaintiff complies with order for his examination..... 94

——Order binding while in force, though not properly granted.. 94

——Of adversary before trial. The affidavit on which the order is based must contain an allegation that the testimony sought to be obtained "is material and necessary for the party making the application"..... 243

——Of party before trial. A party may examine his adversary before trial in order to frame his pleading or complete his proof, but not to ascertain whether he has a cause of action or a defense against the adversary..... 194

EXECUTOR'S ACCOUNTING. Expenses incurred in unwise and fruitless litigation will not be allowed..... 78

EXTRA ALLOWANCE IN CONDEMNATION PROCEEDINGS. Applies only to proceedings instituted under the general condemnation law, and not to those under a special statute.... 14

——No allowance can be granted, in a foreclosure case under section 3253, subd. 2 of the Code, where no defense has been interposed in the action, as such fact must appear as a condition precedent to the right of the plaintiff to an allowance.. 372

FALSE ANSWER. Interposition of false answer not a contempt of court..... 116

——See Contempt..... 273

FICTITIOUS name of defendant. See Designation..... 247

FINDINGS. Must be passed upon by referee appointed by Surrogate's Court..... 59

PAGE

FORECLOSURE of mechanic's lien. Where a judgment has been recovered for the debt, the return of execution unsatisfied is an indispensable condition to the maintenance of an action to foreclose the lien..... 237

FORECLOSURE. Compensation of referee on sale in foreclosure..... 100

FOREIGN CORPORATION. Action by resident of the State against a foreign corporation—residence of plaintiff—jurisdiction..... 108

HABEAS CORPUS. See Appeal..... 226

JOINT cause of action. See Demurrer..... 347

JUDGMENT. When clerk is not authorized to enter judgment upon referee's report..... 6

——Note on entry of judgment on referee's report..... 12

——Entry of. See Entry..... 144

JURY TRIAL. On a trial in a Justice's Court, unless a jury trial is demanded at the time of the joining of issue, the right to trial by jury shall be deemed waived..... 191

——The rule of Court, requiring an application to frame issues to be tried by a jury, in a case in which the party is not entitled of right to such a trial, to be made within ten days after issue joined is imperative, except where facts are shown to excuse neglect to apply in season..... 353

——An order granting a jury trial of issues in an equity suit is appealable..... 353

JUSTICE'S RETURN on appeal. Time for filing..... 342

LEASEHOLD ESTATE. The phrase "real property," in section 3253 of the Code of Civil Procedure, does not include leasehold estates so as to bring an action for the foreclosure of a mortgage thereon within subdivision 1 of that section..... 372

LIMITATIONS, STATUTE OF. Interpretation of section 401 of the Code of Civil Procedure..... 205

——Motion to amend answer by setting up Statute of Limitations..... 306

——Trustee of corporation; failure to file annual report..... 310

LIS PENDENS. The fact that the *lis pendens* in a suit to foreclose a mortgage was filed before the filing of the complaint does not constitute a fatal defect, where it does not appear that any right was acquired by anybody as against the property by incumbrance or lien, intermediate the beginning of the suit and the decree and sale thereunder..... 398

LUNATIC. See Committee..... 196

MANDAMUS, not the proper remedy to review an erroneous decision..... 89

MECHANIC'S LIEN. An action at law, once begun, to enforce the debt secured by a mechanic's lien, must be carried through to completion, and the legal remedy exhausted, be-

PAGE

fore the lienor can have recourse to the equitable remedy of foreclosure; and the complaint in foreclosure which does not allege the issue and return of execution unsatisfied is demurrable..... 62

MECHANIC'S LIEN. See Bond..... 261

——See Foreclosure..... 237

MISREPRESENTATION AS GROUND FOR ANNULLING MARRIAGE. A marriage will not be annulled upon the ground of fraud, because the defendant had falsely represented to plaintiff that she had never been previously married, even though the plaintiff was by such misrepresentation induced to marry the defendant..... 38

NON-RESIDENT plaintiff. See Examination..... 94

PARTITION. Section 1548 of the Code of Civil Procedure, providing that "in a partition action the executors or administrators and creditors of a deceased person, who, if living, should be a party to said action, must be made parties defendant," applies only to the case of a deceased owner of an undivided share, and not to the common ancestor of the parties to the partition..... 374

——See Creditor's Lien..... 228

PAYMENT. Non-payment as a necessary element of plaintiff's cause of action and payment as an affirmative defense..... 147

PENSION MONEYS. Property purchased with pension moneys is exempt from seizure for non-payment of taxes..... 267

PERSONALTY. Decree of Surrogate's Court, admitting will to probate, binding only as to personalty..... 128

——The succession to an intestate's personal property is governed by the law of the actual domicile of the intestate at the time of his death..... 159

PHYSICAL examination of party before trial. Attorney cannot be required to produce the plaintiff..... 56

PHYSICIAN AND PATIENT PRIVILEGED. In an action for personal injuries, the plaintiff by calling one or two physicians who had attended her, and not the other, as her own witness, and requiring him to disclose the facts and results of the examination and consultation, and make public what took place between the plaintiff and her two physicians, has waived the privilege of secrecy given under section 834 of the Code of Civil Procedure, and can no longer impose silence on the other physician..... 168

PLEADING AND PROOF. See Payment..... 147

PLEADINGS. A plaintiff's pleadings are to be taken together, and if together they state facts sufficient to constitute a cause of action, the suit may be maintained, although the complaint alone may not be sufficient..... 276

PAGE

POOR PERSON. Order permitting prosecution as "poor person" appealable because affecting a substantial right..... 35
PRACTICE. See Appeals..... 266
PRIVILEGED. Knowledge obtained by physician in his professional capacity..... 168
PROBATE OF WILL. Decree binding only as to personalty.. 138
——Upon proof of handwriting of testator and subscribing witnesses..... 25
——When an action to determine the validity of the probate of a will may be commenced..... 65
——Waiver of service of citation does not confer jurisdiction... 71
PROMISSORY NOTE. In an action upon a promissory note for a money judgment, a general assignee for the benefit of creditors of the makers of the note is interested in the subject of the action, within the meaning of section 452 of the Code of Civil Procedure; and such assignee on his own application may be made a party defendant..... 332
PUBLICATION, Service of summons by. To authorize the order, not only is an affidavit of non-residence necessary, but also a verified complaint showing a sufficient cause of action against the defendant to be served and that the case is one of which the Court can take cognisance..... 223
——Order of publication of summons—affidavit insufficient to support..... 16
——Note on sufficiency of affidavit to support order of publication of summons..... 21
——Order for. Service without the State; attachment; time within which summons must be served..... 290
RECEIVER. Order requiring plaintiff as receiver to file security for costs should be made by the Court..... 29
——Application for the appointment of temporary receiver of mutual fire insurance corporation; what facts must be presented..... 210
——In an action brought under section 2653a of the Code to determine the validity of probate of a will, an order appointing a receiver to preserve the property *pendente lite* under section 718 of the Code will be set aside..... 215
REFEREE, Compensation of, on sale in foreclosure..... 100
REFERENCE. See Costs..... 348
REPLEVIN. See Arrest..... 230
REPLY. Motion to strike off cause for want of reply to counterclaim..... 143
REVOCATION OF PROBATE, Proceeding for—when barred by judgment previously rendered—necessary parties..... 158
——Proceeding for; when citations must issue..... 186
SATISFACTION of judgment by attorney whose authority has been revoked, not conclusive..... 139

PAGE

SECURITY FOR COSTS. Effect of laches in applying for order 5
——Note on right to require security for costs..... 54
——The Court has no power to require a non-resident plaintiff to unite with the sureties in an undertaking for costs..... 345
SERVICE of summons on director of foreign corporation, within the State..... 180
——Of summons by publication. See Publication..... 228
SERVICE OF SUMMONS BY PUBLICATION. See Publication..... 289
——The date of a summons is not so material a part thereof as to require the Court to set aside the service of such summons, on the ground of the variance between the date of the original and the copy..... 388
——See Lis Pendens..... 398
SHERIFF. Action to enforce the liability of the sheriff for bail does not abate on death of sheriff..... 70
SHERIFF'S FEES on attachment; by whom paid..... 285
STATUTE OF LIMITATIONS. See Action..... 408
STAY ON APPEAL. An order of the special term, setting aside the award of commissioners, is an order affecting a substantial right, and the Court has power to grant a stay on an appeal from such order..... 283
——See Contempt..... 363
SUBSTITUTED PARTIES. See Additional Parties..... 122
SUBSTITUTION of indemnitors on bond as defendants in place of sheriff..... 283
——Application to substitute defendant under section 820 of the Code; rivil claimants disagree as to amount due..... 288
——Of representatives of deceased plaintiff as plaintiffs in the action..... 163
SUMMARY PROCEEDINGS. Landlord may remove sub-lessee after expiration of lease to lessee..... 86
——Injunction to stay warrant and open judgment denied..... 92
——Counterclaim against guardian personally not available in summary proceedings..... 106
SUMMONS. See Service..... 383
SUPPLEMENTAL PLEADINGS not necessary..... 163
SUPPLEMENTARY PROCEEDINGS. Order requiring third person to pay over money, the ownership of which is in dispute..... 320
——Effect of direction to third person to pay over..... 44
——The interest of a beneficiary in a trust fund, created by a person other than the debtor, cannot be reached in proceedings supplementary to execution, and a bill by a receiver in supplementary proceedings in the nature of a creditor's bill to subject the surplus of such a trial fund cannot be maintained..... 380

PAGE

SUPPLEMENTARY PROCEEDINGS. Under section 2442 of the Code, a Judge of the City Court of New York has power to appoint a referee in proceedings supplementary to execution upon a judgment recovered in said Court.... 390

SURETY. Liability of surety released under section 2600 of the Code ..... 357

SURROGATE'S power to detain share of beneficiaries, where an account shows a fund ready for distribution..... 357

SURVIVAL of cause of action..... 163

TESTAMENTARY GUARDIAN. Mother of infant cannot be appointed..... 42

TRUST FUND. See Supplementary Proceedings..... 380

UNDERTAKING. An appeal from judgment of sale of real property; appellant must be in possession..... 385

UNITING of actions against two or more persons severally liable upon the same written instrument..... 217

VALIDITY OF PROBATE, action to determine the; appointment of receiver *pendente lite*..... ..... 215

VENUE, CHANGE OF. The defendant in an action is not in a position to insist as a matter of right that the place of trial shall be changed, while it has defaulted in serving its answer; even though the default has been opened or the answer received by consent of the parties after the expiration of the time to answer..... 376

WAIVER of the service of citation does not confer jurisdiction in the probate of a will..... 71

WARRANT of attachment need not recite the proceedings upon which it rests..... ..... 141

——What is a certified copy of..... 156

7625- 10